

## The 1997 Spousal Support Act

Kenneth Rigby

---

### Repository Citation

Kenneth Rigby, *The 1997 Spousal Support Act*, 58 La. L. Rev. (1998)  
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol58/iss3/5>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact [kreed25@lsu.edu](mailto:kreed25@lsu.edu).

# The 1997 Spousal Support Act

Kenneth Rigby\*

## I. BACKGROUND

Prior to the advent in Louisiana of no-fault divorce, or divorce granted because the spouses have lived apart for specific periods of time, the fault of the spouses had always played a role in a claim by a spouse for post-divorce alimony. Originally, separation from bed and board and divorce were granted only on fault grounds. Article 138 of the Revised Louisiana Civil Code of 1870 specified the fault causes for claiming a decree of separation from bed and board.<sup>1</sup> Article 139 of the Revised Civil Code of 1870 specified the limited fault causes for which an immediate divorce could be claimed.<sup>2</sup> The fault of a spouse was judicially determined by the other spouse obtaining a judgment of separation from bed and board or divorce on one of the enumerated fault grounds. Originally, Article 160 of the Revised Louisiana Civil Code provided that if the wife *who has obtained the divorce* has not sufficient means for her

---

Copyright 1998, by LOUISIANA LAW REVIEW.

\* Attorney at Law, Shreveport, Louisiana; Adjunct Professor, LSU Law Center; Member of Persons Committee and Council, Louisiana State Law Institute.

1. Louisiana Civil Code article 138 (1870) provided:

Separation from bed and board may be claimed reciprocally for the following causes:

1. In case of adultery on the part of the other spouse;
2. When the other spouse has been condemned to an infamous punishment;
3. On account of habitual intemperance of one of the married persons, or excesses, cruel treatment, or outrages of one of them toward the other, if such habitual intemperance, or such ill-treatment is of such a nature as to render their living together insupportable;
4. Of a public defamation on the part of one of the married persons towards the other;
5. Of the abandonment of the husband by his wife or the wife by her husband;
6. Of an attempt of one of the married persons against the life of the other;
7. When the husband or wife has been charged with an infamous [infamous] offense, and shall actually have fled from justice, the wife or husband of such fugitive may claim a separation from bed and board, on producing proofs to the judge before whom the action for separation is brought, that such husband or wife has actually been guilty of such infamous offense, and has fled from justice.

2. Louisiana Civil Code article 139 (1870) provided:

Married persons may also claim reciprocally a divorce for the several causes enumerated in article 138; but, except in the cases where the husband or wife may have been sentenced to an infamous punishment, or convicted of adultery, no divorce shall be granted, unless a judgment of separation from bed and board shall have been rendered between the parties, and one year shall have expired, from the date of the judgment of separation from bed and board, and no reconciliation shall have taken place; in the cases excepted above, a judgment of divorce may be granted in the same decree which pronounces the separation from bed and board.

maintenance, the court may allow her, in its discretion, out of the property of her husband, alimony which could not exceed one-third of his income.<sup>3</sup> The wife's entitlement to alimony was based, *inter alia*, on the fault of the husband against whom the wife had obtained a fault-based divorce. Louisiana Acts 1916, No. 269<sup>4</sup> was enacted to authorize a divorce based upon the parties' having lived

3. Louisiana Civil Code article 160 (1870) provided:

If the wife who has obtained the divorce, has not sufficient means for her maintenance, the court may allow her, in its discretion, out of the property of her husband, alimony which shall not exceed one-third of his income.

This alimony shall be revocable in case it should become unnecessary, and in case the wife should contract a second marriage.

Prior to 1855, a wife, after obtaining a divorce, was not entitled to alimony in Louisiana. *Player v. Player*, 162 La. 229, 231, 110 So. 332, 333 (La. 1926). 1855 La. Acts No. 307 amended the Civil Code by adopting Article 160 granting alimony to the wife who had obtained the divorce. *Player*, 162 La. at 231, 110 So. at 333. Originally, it was payable "out of the property of her husband." 1916 La. Acts No. 247 amended Article 160 to make alimony payable out of the earnings, as well as out of the property, of the husband. *Player*, 162 La. at 231, 110 So. at 332. *Player* characterized alimony after divorce as a "pension," which was payable "to the unfortunate spouse who has obtained the divorce." *Id.* *Player* held that as the marriage is forever dissolved, there is no obligation arising from it. *Id.* at 232, 110 So. at 333. The Louisiana Supreme Court in *Fortier v. Gelpi* described the alimony authorized by Civil Code article 160 as a "pure gratuity," that it was not "necessarily due the divorced wife, arising from a marriage forever dissolved" and that it was "to be granted . . . in the discretion of the court." *Fortier v. Gelpi*, 195 La. 449, 197 So. 138, 140 (La. 1940).

*Player* also held that "a separate suit *ex rei necessitate* is the only procedure by which the wife who has obtained the divorce can assert and enforce her right to the alimony which may be due her." *Player*, 162 La. at 231, 110 So. at 332. It stated, "To claim alimony in such a case as an incidental demand (of the divorce action) is not legally possible." *Id.* at 231, 110 So. at 332. See also *McAlpine v. McAlpine*, 679 So. 2d 85, 88-90 (La. 1996), for a good review of the legislative and jurisprudential history of alimony in Louisiana, including Planiol's view that alimony was reparation for the wrongful act of the guilty spouse, arising out of the duty to make pecuniary amends for an illicit act.

4. 1916 La. Acts No. 269, § 1 provided:

Be it enacted by the General Assembly of the State of Louisiana, That when married persons have been living separate and apart for a period of seven years or more, either party to the marriage contract may sue, in the courts of the state of his or her residence, provided such residence shall have been continuous for period of seven years, for an absolute divorce which shall be granted on proof of the continuous living separate and apart of the spouses, during said period of seven years or more.

The supreme court, in *Vincent v. LeDoux*, stated that this Act reflected the public policy of the state:

As we see the matter, the General Assembly has unmistakably declared the public policy of the state to be that it is better, in the interest of society and good morals, that married persons, who, for whatever reason there may be, no longer live together, or are likely to do so, should be released from the bonds that were intended to keep them together, and should be allowed to establish other and perhaps happier marital relations.

*Vincent v. LeDoux*, 146 La. 144, 157, 83 So. 439, 443 (La. 1919). This public policy is reflected in all subsequent no-fault divorce laws.

The supreme court in *North v. North* noted this change in Louisiana divorce law:

The act under which this suit is brought introduced a new and independent cause for divorce in this state, and that act does not take into consideration the question of what cause produced the separation or on whose fault the separation was brought about. The

separate and apart for a period of seven years or more. This was the initial no-fault divorce legislation in Louisiana. Louisiana Acts 1928, No. 21<sup>5</sup> amended Civil Code article 160 to provide that if the husband had obtained a judgment of divorce on the ground that the married persons had been living separate and apart for a period of seven years or more, *and the wife had not been at fault*, the court could allow her alimony. The fault of the spouses is not determined by which spouse obtains the judgment of divorce in a no-fault proceeding. Therefore, this amendment to Civil Code article 160 specified that the wife was entitled to alimony when the husband obtained the judgment of divorce if the alimony was needed and if she had not been at fault, because Civil Code article 160 previously conditioned the wife's right to alimony after the divorce on her having obtained the divorce. The act marked a change in the focus of the fault

---

only requirement of the statute as a condition precedent to granting the divorce is that the parties have actually and in fact lived separate and apart and in different domiciles for a period of seven years complete, during which period one of the parties at least has continued to reside in this state.

*North v. North*, 164 La. 293, 296, 113 So. 852, 853 (La. 1927). However, the court held that the wife could not obtain permanent alimony when the husband obtained the divorce on the grounds of separation for a period of seven years:

As to the demand for future alimony, it is sufficient to say that such alimony is only allowed as an incident to a suit or demand by the wife for separation or for divorce and is not allowable where the husband obtains a divorce, under the act of 1916.

*Id.* at 296, 113 So. at 853.

5. 1928 La. Acts No. 21 amended Civil Code article 160 to provide:

If the wife who has obtained the divorce has not sufficient means for her maintenance, the Court may allow her in its discretion, out of the property and earnings of her husband, alimony which shall not exceed one-third of his income; provided, however, that in cases where the husband has obtained judgment of divorce on the ground that the married persons have been living separate and apart for a period of seven years or more, and the wife has not been at fault, then the court may allow the wife in its discretion, out of the property and earnings of her husband, alimony which shall not exceed one-third of his income.

This alimony shall be revocable in case it should become unnecessary, and in case the wife should contract a second marriage.

1932 La. Acts No. 31 amended 1916 La. Acts No. 269 to decrease the period of separation to four years. Civil Code article 160, as amended by 1928 La. Acts No. 21, was not amended. The supreme court in *Blakely v. Magnon* held that the result was that the wife could not be awarded alimony when the husband obtained the divorce on the grounds of separation for a period of four years, as Article 160, as amended by 1928 La. Acts No. 21, provided that the wife who was without fault could be awarded alimony only when her husband obtained the divorce on the grounds of a seven year separation. *Blakely v. Magnon*, 180 La. 464, 156 So. 466 (La. 1934). In response to this decision, the legislature adopted Act 27 of the Second Extra Session of 1934, amending Civil Code article 160, to provide that if a divorce is granted on the grounds that the married persons have been living separate and apart "for a certain specified period of time" and the husband obtained the divorce on that ground, and the wife has not been at fault, that the court could allow her alimony. The supreme court held in *Paulsen v. Reinecke* that the act was not remedial and was not retroactive to a divorce judgment obtained by the husband under 1932 La. Acts No. 31 (four year separation) prior to the enactment of Act 27, 2d Extra Session 1934. *Paulsen v. Reinecke*, 181 La. 917, 160 So. 629 (La. 1935).

inquiry. Previously it was whether the husband had been at fault, evidenced by the wife's obtaining of a fault-based divorce against him. Now, the focus became whether the wife seeking alimony had or had not been at fault when the husband obtained a no-fault divorce. Eventually, the focus in all situations was whether the wife had been at fault, especially after the amendment of Civil Code article 160 by Louisiana Acts 1964, No. 48.<sup>6</sup>

When the required separation period for a no-fault divorce was reduced to four years,<sup>7</sup> to two years,<sup>8</sup> then one year,<sup>9</sup> and finally six months,<sup>10</sup> a problem arose. In many instances, the issue of the fault of the spouse seeking post-divorce alimony had not been determined by the time the required period of living separate and apart had expired, thus entitling the other spouse to a divorce.<sup>11</sup> Civil Code article 148 support, commonly called alimony pendente lite, was intended to supply the wife a sum for her support pending the suit for separation from bed and board or for divorce.<sup>12</sup> The Louisiana Supreme Court in *Holliday v. Holliday*<sup>13</sup> held that an award of alimony pendente lite is merely an enforcement of the obligation of the husband to support his wife established in Civil Code article 120, now repealed.<sup>14</sup> Inevitably, there was presented to the Louisiana Supreme Court the conflict between a husband's right to a divorce after living apart from his wife for the statutory period of time, and the right of a wife to continue to be supported by him until a judicial determination of whether or not she was guilty of fault. In *Cassidy v. Cassidy*,<sup>15</sup> the wife was awarded alimony pendente lite in the husband's separation suit. Each spouse alleged cruel treatment on the part of the other. Before the case could go to trial, the husband amended his petition to ask for a divorce because he and his wife had lived separate and apart for one year. After a trial on the merits, the trial court granted a separation on the grounds of

---

6. *Bruner v. Bruner*, 364 So. 2d 1015 (La. 1978).

7. 1932 La. Acts No. 31 reduced the required period of living separate and apart in order to obtain a divorce to four years.

8. 1938 La. Acts No. 430.

9. 1990 La. Acts No. 1009, § 2, effective Jan. 1, 1991, enacting Civil Code article 103, reproducing the substance of former La. R.S. 9:301 (1989) without change.

10. 1991 La. Acts No. 918, § 1, amending Civil Code article 103(1) to substitute "six months" for "one year" as the minimum qualifying period of living separate and apart.

11. Kenneth Rigby and Katherine Shaw Spaht, *Louisiana's New Divorce Legislation: Background and Commentary*, 54 La. L. Rev. 19, 39-40 (1993), cited and quoted in *Wascom v. Wascom*, 691 So. 2d 678, 682 (La. 1997).

12. The alimony paid to the wife pending a suit for divorce arises solely from the marriage relation and the duty of the husband to support her. *Player v. Player*, 162 La. 229, 232, 110 So. 332 (La. 1926).

13. 358 So. 2d 618 (La. 1978).

14. *Id.* at 619-20. Former Civil Code article 120 provided:

The wife is bound to live with her husband and to follow him wherever he chooses to reside; the husband is obliged to receive her and to furnish her with whatever is required for the convenience of life, in proportion to his means and condition.

Civil Code article 120 was repealed by 1985 La. Acts No. 271 § 1.

15. 477 So. 2d 84 (La. 1985).

mutual fault<sup>16</sup> and a divorce based on the couple living separate and apart for one year.<sup>17</sup> This judgment precluded the wife from obtaining permanent alimony.<sup>18</sup> The wife appealed the judgment finding her to be at fault in the separation. The husband ceased paying the alimony pendente lite. The trial court refused to issue a rule compelling the husband to continue paying her the alimony pendente lite. On writs, the supreme court held that the wife's appeal kept alive her demand for alimony pendente lite and that the husband should have continued paying the alimony pendente lite as long as the suit was pending and until a definitive resolution of the divorce litigation.<sup>19</sup>

Relying on *Cassidy*, the first, second, and third circuit courts of appeal held that alimony pendente lite does not terminate upon the rendering of a judgment of divorce where the issue of fault either has not been determined or is pending on appeal at the time of the rendering of the divorce judgment.<sup>20</sup> The fourth and fifth circuit courts of appeal, also citing *Cassidy*, held that a final judgment of divorce terminates the obligation to pay alimony pendente lite, whether or not the issue of the fault of the wife has been judicially determined.<sup>21</sup>

---

16. This judgment was authorized by former Civil Code article 141, added by 1976 La. Acts No. 495, and repealed by 1990 La. Acts No. 1009, § 2. It provided:

A separation from bed and board shall be granted although both spouses are mutually at fault in causing the separation. In such instances, alimony pendente lite may be allowed but permanent alimony shall not be allowed thereafter following divorce.

17. This judgment was authorized by former La. R.S. 9:301, as amended by 1979 La. Acts No. 360. 1990 La. Acts No. 1009, effective Jan. 1, 1991, repealed former La. R.S. 9:301. It had provided:

When the spouses have been living separate and apart continuously for a period of one year or more, either spouse may sue for and obtain a judgment of absolute divorce.

18. Former Civil Code article 141, added by 1976 La. Acts No. 495, and repealed by 1990 La. Acts No. 1009, § 2.

19. The supreme court opinion states, "Mrs. Cassidy devolutively appealed the judgment finding her at fault in the separation." *Cassidy v. Cassidy*, 477 So. 2d 84, 84 (La. 1985). The opinion later states, "Alimony pendente lite should continue during the pendency of an appeal until the divorce judgment becomes definitive." *Id.* at 85. Relying on *Viser v. Viser*, 243 La. 706, 146 So. 2d 409 (1962), in which the rejection of a demand for a judgment of separation was itself appealed, the court in *Cassidy* held:

Mrs. Cassidy's appeal kept alive her demand for alimony; if, on appeal, she had been found not at fault, she had a right to permanent alimony; there was no "final determination" of the litigation until the finality of the judgment on appeal. The litigation between the Cassidys was still pending; as long as suit was pending Mr. Cassidy should have continued paying Mrs. Cassidy alimony pendente lite until death or a definitive resolution of the divorce litigation.

*Cassidy*, 477 So. 2d at 86. The dissent pointed out that the divorce judgment was not appealed, and since Mrs. Cassidy's appeal related to permanent alimony only, the effect of the divorce judgment was not suspended.

20. *Unkel v. Unkel*, 651 So. 2d 382 (La. App. 2d Cir. 1995); *Wilson v. Brittain*, 640 So. 2d 261 (La. App. 1st Cir. 1993); *Miguez v. Miguez*, 604 So. 2d 1056 (La. App. 2d Cir.), writ denied, 608 So. 2d 194 (1992); *Nungesser v. Nungesser*, 558 So. 2d 695 (La. App. 1st Cir.), writ denied, 560 So. 2d 30 (1990); *Nugent v. Nugent*, 533 So. 2d 1370 (La. App. 3d Cir. 1988).

21. *Lacoste v. Lacoste*, 655 So. 2d 1229 (La. App. 4th Cir. 1995), writ granted, 667 So. 2d 1036 (1996), writ dismissed, 693 So. 2d 147 (1996); *Wheelahan v. Wheelahan*, 644 So. 2d 1125 (La.

This conflict was resolved by the supreme court in *Wascom v. Wascom*,<sup>22</sup> which held that alimony pendente lite may not be awarded for any period of time after the rendition of a final judgment of divorce because alimony pendente lite is based on the codal obligation of mutual support between married persons in present Civil Code article 98<sup>23</sup> which terminates at the time of the termination of the marriage through divorce.<sup>24</sup>

*Wascom* discusses the "near-comprehensive" revision of the law on separation and divorce in 1990,<sup>25</sup> noting that, although the legislature enacted seven of the eight separate bills proposed by the Louisiana State Law Institute as a comprehensive revision of the law of divorce and its incidental proceedings,<sup>26</sup> it elected not to enact the Law Institute's revision of the law of spousal support.<sup>27</sup> The court emphasized the dilemma caused by the revision of the law of divorce, making it possible for either spouse to obtain a divorce one hundred-eighty days after service of a petition (or even earlier), and the legislature's failure to provide any statutory authorization for support of a spouse where fault has not been determined at the time of the rendering of the divorce judgment.<sup>28</sup>

App. 4th Cir. 1994), *writ denied*, 650 So. 2d 252 (1995); *Williams v. Williams*, 541 So. 2d 928 (La. App. 5th Cir.), *writ denied*, 544 So. 2d 384 (1989).

22. 691 So. 2d 678 (La. 1997). *See also* *Watts v. Watts*, 699 So. 2d 915 (La. App. 2d Cir. 1997).

23. Civil Code article 98, enacted by 1987 La. Acts No. 886 § 1, effective January 1, 1988, provides: "Married persons owe each other fidelity, support and assistance."

24. *Wascom v. Wascom*, 691 So. 2d 678, 683 (La. 1997).

25. *Id.* at 682-83.

26. *Id.* at 682.

27. *Id.* at 682. *See* Kenneth Rigby, 1993 *Custody and Child Support Legislation*, 55 La. L. Rev. 103 (1994), for the following catalogue of the legislative action to that time on each of the packages of bills introduced in the House of Representatives upon recommendation of the Louisiana State Law Institute:

1. The law of divorce was revised by 1990 La. Acts No. 1009, § 2 (effective January 1, 1991), as amended by 1991 La. Acts No. 367, § 1 (effective September 6, 1991). The law of claims for contributions to a spouse's education was revised by 1990 La. Acts No. 1008, § 2 (effective January 1, 1991), as amended by 1991 La. Acts No. 367, § 1 (effective September 6, 1991). The law of incidental proceedings in an action of nullity was revised by 1993 La. Acts No. 108, § 1 (effective January 1, 1994). "Housekeeping" revisions were included in 1990 La. Acts No. 1009 (effective January 1, 1991). The law of custody and child support was revised by 1993 La. Acts No. 261 (effective January 1, 1994). The spousal support proposal, reintroduced as H.R. 963 (1993), was deferred by the House Committee on Civil Law and Procedure. It has been revised and approved by the Council of the Law Institute, and will be reintroduced at a future session of the Legislature.

The spousal support proposal was reintroduced as House Bill No. 2053 in the 1997 regular session of the Louisiana Legislature and enacted, with the amendments hereafter noted in this article, as 1997 La. Acts No. 1078.

*See* Rigby and Spaht, *supra* note 11, at 39-40 for a legislative history of these eight Law Institute proposals and the problem created by the failure to pass the revision of spousal support proposal, later addressed in *Wascom*.

28. *Wascom*, 691 So. 2d at 682.

In 1997, the Louisiana State Law Institute again submitted to the legislature its recommended revision of spousal support law.<sup>29</sup>

## II. THE LOUISIANA STATE LAW INSTITUTE RECOMMENDATIONS

The Louisiana State Law Institute recommendations introduced some new concepts. The distinction between alimony pendente lite and permanent alimony, with the granting of a divorce delineating the line between the two, was eliminated. The terms *alimony pendente lite* and *permanent periodic alimony*, with all of their emotional baggage, were eliminated. The term *spousal support* was substituted.<sup>30</sup> Spousal support includes both interim periodic support and final periodic support.<sup>31</sup> The award of either or both is completely independent of the rendition of a judgment of divorce. The award of either type of spousal support may occur before or after divorce, or the award may be made at the time of the rendition of divorce.<sup>32</sup> This new approach eliminates the struggle reflected in *Cassidy* and *Wascom* to harmonize and balance the interest of one spouse to obtain a divorce with the interest of the other spouse to receive needed support until the issue of fault and continued entitlement to support can be determined. The Law Institute recommended that fault of the claimant spouse not be a bar to final periodic support, but that the comparative marital misconduct, if any, of both parties be one of the factors that a court could consider in determining the entitlement, amount, and duration of final spousal support.<sup>33</sup>

---

29. House Bill No. 2053, Regular Session 1997, adopted as 1997 La. Acts No. 1078, Regular Session, effective Jan. 1, 1998.

The Louisiana State Law Institute was created by 1938 La. Acts No. 166. La. R.S. 24:201-208, 251-256 (1989). Among its other statutory duties as an official advisory law revision commission, law reform agency and legal research agency of the State of Louisiana, it has the duty to consider needed improvements in both substantive and adjective law and to make recommendations concerning the same to the legislature. La. R.S. 24:204 (1989).

30. Comment (a), Revision Comments - 1997 to La. Civ. Code art. 111.

31. La. Civ. Code arts. 111, 113, effective Jan. 1, 1998.

32. La. Civ. Code art. 111, effective Jan 1, 1998.

33. The legislature did not adopt this recommendation. Proposed Civil Code article 112 in House Bill No. 2053, Regular Session 1997, provided, in part:

A. The court must consider all relevant factors in determining the entitlement, amount, and duration of final support. Those factors may include:

• • • •

(11) The comparative marital misconduct, if any, of the parties.

B. The term "marital misconduct" as used in this Article means any substantial act or omission that violates a spouse's marital duties or responsibilities.

Proposed Comment (b) to proposed Civil Code article 112 in House Bill No. 2053, Regular Session 1997, stated:

(b) This Article changes the law governing the effect of marital misconduct on a spouse's claim for support. Under the prior law misconduct that rose to the level of one of the then-existing fault grounds for divorce or legal separation operated as a bar to the guilty spouse's receiving post-divorce support. C.C. Art. 160 (rev. 1982 & 1986); *Adams v. Adams*, 389 So.2d 381 (La. 1980). Under this Article, by contrast, misconduct is only



It recommended that a court could fix the term or duration of final spousal support for the purpose of providing rehabilitative spousal support,<sup>34</sup> and that

one of eleven factors that may be considered by the court in deciding the entitlement to and amount of spousal support, and the comparative misconduct of both spouses is to be considered, not merely that of the spouse who seeks support. Nevertheless, the court still has the discretion to find, in an appropriate case, that marital misconduct of one spouse is sufficiently serious to operate as a complete bar to any award of spousal support to that spouse.

34. The legislature adopted this recommendation. Louisiana Civil Code article 112 provides, in part:

A. The court must consider all relevant factors in determining the entitlement, amount, and *duration* of final support. Those factors may include:

• • • •

(6) The time necessary for the claimant to acquire appropriate education, training or employment (emphasis added).

Comments (c) and (g), Revision Comments - 1997 to La. Civ. Code art. 112 state the purposes of considering this factor:

(c) The sixth factor listed in this Article, coupled with the word "duration" in the first sentence of the Article, permits the court to award rehabilitative support and other forms of support that terminate after a set period of time. The absence from Article 111, *supra*, of the word "permanent," which was formerly found in the source provision before "periodic alimony" (see former C.C. Art. 112, as amended 1982 & 1986) emphasizes the authority of the court in this regard, thus legislatively overruling *Teasdel v. Teasdel*, 493 So.2d 1165 (La.1986), and *Hegre v. Hegre*, 483 So.2d 920 (La.1986). The appropriateness of a rehabilitative award depends upon the capacity of the recipient spouse to become self-supporting, in light of the relevant factors listed in this Article. See *Rovira v. Rovira*, 550 So. 2d 1237, 1239 (La.App. 4 Cir.1989) writs denied 552 So.2d 398 (La.1989). The duration of such an award should be determined primarily by the amount of training or other preparation that the recipient requires in order to secure employment that will meet his needs, as similarly defined. See K. Spaht, "Developments in the Law, 1979-1980, 'Persons,'" 41 La.L.Rev. 372 (1981); *Geter v. Geter*, 404 So.2d 1283 (La.App. 2d Cir.1981). Cf. *Ducote v. Ducote*, 573 So.2d 560, 562 (La.App. 5th Cir.1991) (assessing time needed for recipient to become self-supporting in payor's action to terminate permanent alimony). Other factors may also form the basis of a fixed-duration award, but it is contemplated that such awards will ordinarily be based upon the assumption that certain facts (such as employment of the recipient) will occur within the term fixed in the judgment awarding support. If those facts have not occurred at or after the expiration of the specified term, the recipient may seek modification of the judgment upon proof that circumstances have changed since the awards were made; i.e., that the facts the court assumed would occur did not. But see comment (g), *infra*.

• • • •

(g) The factors listed in this Article should be considered whenever the court makes or modifies a final spousal support award. Except as provided in Civil Code Article 117, *infra*, the court may make such an award at any time either during the process or after the rendition of the final judgment of divorce.

Comment (d), Revision Comments - 1997 to La. Civ. Code art. 111 states:

(d) The use of the term "periodic" in this Article reflects a change effected by this Section as a whole. The authorization given the court in former Civil Code Article 112(B) (Civil Code Article 160 prior to its redesignation in 1991) to award alimony in a "lump sum" when the parties consented thereto has been suppressed as inappropriate in this Article. The awarding of rehabilitative support, with or without the parties' consent,

the standard of living of the parties during the marriage<sup>35</sup> and the duration of the marriage<sup>36</sup> be statutory factors that a court could consider in determining the entitlement, amount, and duration of final support. The Law Institute recommended that final spousal support be limited to one-third of the obligor's income, without delineating whether the limitation applied to gross or net income.<sup>37</sup> The Law Institute recommended limiting an award of an interim allowance to those instances when a demand for final support was pending.<sup>38</sup> It also

is permitted under the terms of Article 112, *infra*. See comment (d) thereto.

35. The legislature did not adopt this recommendation. Proposed Civil Code article 112 in House Bill No. 2053, Regular Session 1997, provided, in part:

A. The court must consider all relevant factors in determining the entitlement, amount, and duration of final support. Those factors may include:

\* \* \* \*

(8) The standard of living of the parties during the marriage.

Proposed Comment (e) to proposed Civil Code article 112 in House Bill No. 2053, Regular Session 1997, stated:

(e) The eight factor listed in this Article, "the standard of living of the parties during the marriage," is new. It changes the law by permitting the court to consider more than just the cost of "necessities" in setting the amount of spousal support. See *Slaytor v. Slaytor*, 576 So.2d 1121 (La.App. 3rd Cir. 1991); *Gottsegen v. Gottsegen*, 508 So.2d 162 (La.App. 4th Cir.1987); *Bernhardt v. Bernhardt*, 283 So.2d 226 (La.1976). This change reflects one of the purposes of spousal support awards under this revision, which is to do justice by equitably allocating the economic advantages enjoyed by the parties during the marriage. This factor appears in the spousal support statutes of a number of other states. E.g., Fla. Stats. Ann. Sec. 61.08(West 1992); Ohio Rev. Code Ann. Sec. 3105.12(1992).

36. The legislature adopted this recommendation. Civil Code article 112 provides, in part:

A. The court must consider all relevant factors in determining the entitlement, amount, and duration of final support. Those factors may include:

\* \* \* \*

(8) The duration of the marriage.

Comment (d), Revision Comments - 1997 to La. Civ. Code art. 112 states the purpose of considering this factor:

(d) The eighth factor listed in this Article is new. *Inter alia*, it offers the court a means of assessing the degree to which a spouse's habituation to dependency during the marriage has impaired his earning capacity.

37. The legislature did not adopt this recommendation. Proposed Civil Code article 112(C) in House Bill No. 2053, Regular Session 1997, provided, "The sum awarded under this Article shall not exceed one-third of the obligor's income." Proposed Comment (h) to proposed Civil Code article 112 in House Bill No. 2053, Regular Session 1997, stated:

(h) The one-third limitation on final spousal support contained in former Civil Code Article 112 has been carried forward in this revision. The court may not therefore award final spousal support in excess of one third of the payor spouse's income. See *Slaytor v. Slaytor*, 576 So.2d 1121 (La. App. 3rd Cir. 1991) and *Robinson v. Robinson*, 412 So. 2d 633 (La. App. 2d Cir. 1982).

38. The legislature did not adopt this recommendation. Proposed Civil Code article 113 in House Bill No. 2053, Regular Session 1997, provided:

*When a demand for final support is pending*, the court may award a party an interim allowance based on the needs of that party, the ability of the other party to pay, and the standard of living of the parties during the marriage. (emphasis supplied)

Proposed Comment (c) to proposed Civil Code article 113 in House Bill No. 2053, Regular Session

recommended that the obligation of support could not be extinguished by consent unless an action for divorce was pending or a judgment of divorce had been rendered,<sup>39</sup> it could not be extinguished in a pre-marriage contract or during

---

1997, stated:

(c) The phrase, "When a demand for final support is pending" is intended to indicate that an award can be made under this Article only when a party is seeking final spousal support. A claim for an interim allowance may be made incidental to a claim for final spousal support. The same phrase is also intended to indicate that an interim allowance, once made, will only be cut off by the court's final judgment on the issue of final spousal support, not by an intervening judgment of divorce that is silent on the issue of spousal support. This latter implication represents an important change in the law. See *Williams v. Williams*, 541 So. 2d 928 (La. App. 5th Cir. 1989), writs denied 544 So. 2d 284 (La. 1989) (Alimony pendente lite ends at judgment of divorce.); *Lewis v. Lewis*, 404 So. 2d 1230, 1233 (La. 1981) (same).

39. The legislature did not adopt this recommendation. Proposed Civil Code article 116 in House Bill No. 2053, Regular Session 1997, provided:

The obligation of spousal support may not be extinguished by consent unless an action for divorce is pending or a judgment of divorce has been rendered. That consent must be expressed in an authentic act or act under private signature duly acknowledged by the obligee, and the act must receive court approval. The court must approve the act if it finds that the obligee understands the legal consequences of extinction of the obligation.

The Proposed Comments to proposed Civil Code article 116 in House Bill No. 2053, Regular Session 1997, stated:

(a) This Article is new. It clarifies and supplements prior law.

(b) This Article clarifies the effect upon waivers of post-divorce spousal support of two prior amendments to the Civil Code: Acts 1979, No. 711, Sec. 1, which deleted a somewhat ambiguous reference to contractual incapacity between husband and wife from Article 1790 of the Civil Code of 1870, and Acts 1979, No. 709, Sec. 2, which repealed Civil Code Article 2446 (1870). Those two amendments removed the entire statutory basis of *Nelson v. Walker*, 250 La. 545, 197 So.2d 619 (1967), and its progeny, and so effectively overruled the holding of that line of cases that interspousal contracts governing post-divorce alimony were null if made during the marriage. E.g., *King v. King*, 390 So.2d 250 (La.App. 3d Cir.1980) (contract providing for payment of a specific sum of alimony to wife until she remarried was relatively null); *Ward v. Ward*, 339 So.2d 839 (La.1976) (wife's waiver of alimony was null); *Sonnixson v. Whipple*, 283 So.2d 504 (La.App. 1st Cir.1973) (agreement for specified amount of alimony was null). Under this Article, a provision of a contract entered into by the spouses while a divorce action is pending or after a divorce judgment has been rendered may extinguish the obligation of spousal support imposed by this Section. Such a contract, whether made before or after the rendition of the associated divorce judgment, is legal and enforceable if it is in proper form and approved by the court as provided in this Article. See C.C. Arts. 1833, 1836 (rev.1984).

(c) As a prerequisite to judicial approval of a matrimonial agreement between spouses, Civil Code Article 2329 (adopted by Acts 1979, No. 709), requires the finding that the parties understand the governing principles and rules of the proposed matrimonial regime. The courts should therefore consider looking to jurisprudence decided under the Article in applying this one, and vice versa. See, e.g., *Knighten v. Knighten*, 447 So.2d 534 (La.App. 2d Cir.1984), writs denied 448 So.2d 1303 (La.1984). For a discussion of the appropriate considerations under Article 2329 and of the effects of a judgment approving such a contract, see Spaht and Samuel, "Equal Management Revisited," 40 La.L.Rev. 83, 94-100 (1979).

marriage absent a pending divorce action.<sup>40</sup> The consent to the extinguishment of the obligation of spousal support had to be expressed in an authentic act or act under private signature duly acknowledged by the obligee,<sup>41</sup> and the act must receive court approval.<sup>42</sup> If the court found that the obligee understood the legal consequences of the extinction of the support obligation, it must approve the act.<sup>43</sup> The Law Institute also recommended a peremptive period of five years for the right to enforce, after divorce, the obligation of spousal support.<sup>44</sup>

The legislature enacted a majority of the Law Institute recommendations, but adopted a number of amendments to the bill as it was introduced upon

---

(d) This Article permits a spouse to consent to the extinction of the obligation of pre-divorce support while an action for divorce is pending. In so doing it provides an exception to the general rule that the effects of marriage, including the obligation to provide spousal support during the marriage, are matters of public order from which parties may not derogate by contract. See C.C. Art. 98, comment (e)(rev.1987).

(e) The provisions of this Article are intended to impress upon the affected spouse the seriousness of the step about to be taken. Accordingly, this Article applies to any declaration of intent that purports to extinguish the spousal support obligation, whether it takes the form of a unilateral waiver by the prospective recipient or an agreement between the parties. Thus an agreement for lump-sum spousal support must comply with this Article if it is to be construed as precluding future claims for support, and the same is true of a community property partition agreement containing such an extinguishment. (On the other hand, the requirements of this Article will not apply to an associated partition or other agreement if the provision that works the extinguishment is executed and approved separately.) In the case of a provision for extinguishment that is to be made part of a consent judgment, the agreement or provision must be presented to the court in authentic form or in the form of a private act duly acknowledged by the consenting party, and the court must inquire whether the spouse to whom the obligation is owed understands the effect of the extinguishment, before the judgment is rendered.

(f) This Article does not apply to an agreement that fixes, modifies, or otherwise imposes conditions or limitations on spousal support that do not amount to a present or future extinguishment of it.

40. *Id.*

41. *Id.*

42. *Id.* This proposed procedure was roughly parallel to that for the judicial approval of a matrimonial agreement during marriage. See proposed Comment (c) to proposed Civil Code article 116, *supra* note 39.

43. *Id.*

44. The legislature did not adopt this recommendation. Proposed Civil Code article 117 in House Bill No. 2053, Regular Session 1997, provided:

The right to enforce after divorce the obligation of spousal support is subject to a peremption of five years. Peremption begins to run from the latest of the following events:

- (1) The day the judgment of divorce is signed; or
- (2) The day a judgment terminating a previous judgment of spousal support is signed, if the previous judgment was signed in an action commenced either before the signing of the judgment of divorce or within five years thereafter; or
- (3) The day of the last payment made, when the spousal support obligation is initially performed by voluntary payment within the periods described in Paragraphs (1) or (2) and no more than five years has elapsed between payments.

recommendation of the Louisiana State Law Institute, all of which (with one exception) limited, restricted, or reduced the right to either interim periodic support or final periodic support.

### III. THE REVISION

This article reviews each provision of the Act, compares it with previous law and jurisprudence, identifies the Louisiana State Law Institute recommendations that were adopted by the legislature and those that were not adopted, and discusses both the recommendations accepted by the legislature and the ones that were not accepted by the legislature.

### IV. CIVIL CODE REVISIONS

#### A. Article 111

*Art. 111. Spousal support, authority of court*

*In a proceeding for divorce or thereafter, the court may award interim periodic support to a party or may award final periodic support to a party free from fault prior to the filing of a proceeding to terminate the marriage, based on the needs of that party and the ability of the other party to pay, in accordance with the following Articles.<sup>45</sup>*

This article states the basic principle that a court may award interim periodic support or final periodic support, or both, either in a proceeding for divorce or thereafter.<sup>46</sup> The application for, and the awarding of, either or both types of spousal support is separated from the rendition of a judgment of divorce.<sup>47</sup> The

---

45. As amended by 1997 La. Acts No. 1078, § 1, Regular Session, effective Jan 1, 1998.

46. Comment (b), Revision Comments - 1997 to La. Civ. Code art. 111 states:

(b) This Article states the basic principle that a court may award support to a party to an action for divorce out of either the assets or earnings, or both, of the other spouse in accordance with the needs of the claimant and the ability of the other party to pay. See C.C. Art. 231 (1870). Article 112, *infra*, provides the standards to be followed in making final awards. In addition to the two fundamental criteria stated here, the court must consider all relevant factors, which may include any of the nine factors listed in that Article. Article 113, *infra*, authorizes interim awards after the court considers the needs of the claimant and the ability to pay of the other party in light of the standard of living enjoyed by the parties during the marriage.

This article supplements Civil Code article 105 regulating incidental matters, including support for a spouse, in a proceeding for divorce or thereafter. Neither this article nor the previous Civil Code articles 111 and 112 restrict the right granted spouses under Louisiana Revised Statutes 9:291 to sue each other for causes of action pertaining to spousal support while the spouse are living separate and apart. See *Chi v. Pang*, 643 So. 2d 411 (La. App. 3d Cir. 1994).

47. Comment (a), Revision Comments - 1997 to La. Civ. Code art. 111 states:

(a) This Article is new. The term "spousal support" is used in this and the remaining articles of this Section instead of "alimony" in order to emphasize the changes effected

distinction between alimony pendente lite and permanent periodic alimony is abolished, and that distinction recognized in *Wascom v. Wascom*<sup>48</sup> is not carried forward in the new legislation.<sup>49</sup> The basic tests for the amount of spousal support are the needs of the claimant spouse and the ability of the other spouse to pay, continuing the principle of Civil Code article 231.<sup>50</sup> This general principle is made subject to the qualifying rules in the succeeding articles.<sup>51</sup>

The legislature rejected the Law Institute's recommendation that fault of the claimant spouse not be a bar to final spousal support, but that the comparative marital misconduct of the spouses be one of the factors that could be considered in determining the entitlement, amount, and duration of final support.<sup>52</sup> However, it restricted the fault which constitutes a bar to final support to "fault prior to the filing of a proceeding to terminate the marriage."<sup>53</sup> This is a partial recognition that fault which precludes final spousal support should be directly related to, and a substantial cause of, the separation of the spouses that leads to the divorce.<sup>54</sup> If fault on the part of a spouse is to bar that spouse from

---

by this Section. One of the principal changes in prior law made by this article is the separation of the termination of an interim allowance and the entitlement to a final support award from the divorce judgment. An interim allowance may extend (or be awarded) *after* the divorce judgment, and final periodic support may be awarded *before* the divorce judgment. See C.C. Art. 113, Comment (d), *infra*. Under prior law, alimony pendente lite terminated at the time the divorce judgment became definitive. See *Wascom v. Wascom*, 691 So.2d 678 (La.1997).

48. *Wascom v. Wascom*, 691 So. 2d 678 (La. 1997).

49. Comment (a), Revision Comments - 1997 to La. Civ. Code art. 111 states:

(a) This Article is new. The term "spousal support" is used in this and the remaining articles of this Section instead of "alimony" in order to emphasize the changes effected by this Section.

50. Civil Code article 231 provides:

Alimony shall be granted in proportion to the wants of the person requiring it, and the circumstances of those who are able to pay it.

A court interpreted the term "the wants of the person requiring it" as follows: "We deem the word *wants* to mean *needs*." *Newton v. Newton*, 196 So. 2d 575 (La. App. 1st Cir. 1967). See also Comment (b), Revision Comments - 1997 to Civil Code article 111, *supra*.

51. In particular, Civil Code article 112 requires the court to consider, in addition to these two fundamental criteria, all relevant factors in determining the entitlement, amount, and duration of final support, which may include the nine factors listed in that article. Civil Code article 113 requires the court to consider, in addition to these fundamental criteria in article 111, the standard of living of the parties during the marriage in awarding an interim periodic allowance. See Comment (b), Revision Comments - 1997 to Civil Code article 111, *supra*.

52. See *supra* note 33 for text of proposed Civil Code article 112 and proposed Comment (b).

53. La. Civ. Code art. 111.

54. Legal fault consists of serious misconduct which is a cause of the marriage's dissolution. *Allen v. Allen*, 648 So. 2d 359 (La. 1994). *Allen* noted that a number of bills introduced in the Louisiana Legislature to eliminate fault or to eliminate non-adulterous fault as a bar or barrier to permanent alimony failed to pass. *Allen*, 648 So. 2d at 362 nn. 2-3. Since the repeal of Civil Code article 138 specifying the fault grounds for a separation from bed and board, the statutory law has not specified the nature of the fault which precludes permanent alimony. The jurisprudence has held

receiving final spousal support, that fault should be a significant cause of the

---

that the former fault grounds of Civil Code article 138(1-8) and 139 constitute permanent alimony barring fault. *Allen v. Allen*, 648 So. 2d 359 (La. 1994); *Lagars v. Lagars*, 491 So. 2d 5 (La. 1986); *Adams v. Adams*, 389 So. 2d 381 (La. 1980); *Pearce v. Pearce*, 348 So. 2d 75 (La. 1977); *Unkel v. Unkel*, 651 So. 2d 382 (La. App. 2d Cir. 1995); *Billingsley v. Billingsley*, 618 So. 2d 562 (La. App. 2d Cir. 1993); *Taylor v. Taylor*, 579 So. 2d 1142 (La. App. 2d Cir. 1991). See also Comment (c), Revision Comments - 1997 to Civil Code article 111.

See Kenneth Rigby, *Divorce Forms*, 10 West's Code of Civil Procedure, Form 370(5), n.7, at 291 [hereinafter Rigby, *Divorce Forms*] for a discussion of the entitlement to, and amount of, permanent periodic alimony under former Civil Code article 112.

A recent case, *Bourg v. Bourg*, outlines the jurisprudential rules concerning the relationship between fault and former permanent alimony, now applicable to final spousal support, with the exception noted:

A spouse seeking permanent alimony must be without fault. La. C.C. art. 112A(1). The burden of proof is upon the claimant. *Michelli v. Michelli*, 93-2128 p. 13 (La. App. 1st Cir. 5/5/95); 655 So.2d 1342, 1350. Although recent decisions have considered the viability of former La. C.C. art. 138 fault grounds for purposes of alimony preclusion after 1990, the Louisiana Supreme Court resolved the issue in *Allen v. Allen*, 94-1090 (La.12/12/94); 648 So.2d 359.

"Since the statutory law does not specify fault which would deny permanent alimony, legal fault must be determined according to the prior jurisprudential criteria." *Allen v. Allen*, 94-1090 at 8; 648 So.2d at 362. The jurisprudence specifies the conduct which may be considered fault. *Allen v. Allen*, 94-1090 at 9; 648 So.2d at 362.

Fault contemplates conduct or substantial acts of commission or omission violative of marital duties and responsibilities. See *Pearce v. Pearce*, 348 So.2d 75, 77 (La.1977). To constitute fault, misconduct must not only be of a serious nature, but must also be an independent contributory or proximate cause of the separation. *Pearce v. Pearce*, 348 So.2d at 77; *Michelli v. Michelli*, 93-2128 at 13; 655 So.2d at 1350. These acts are synonymous with the fault grounds previously entitling a spouse to a separation or divorce. See *Lagars v. Lagars*, 491 So.2d 5, 7 (La.1986). They include adultery, conviction of a felony, habitual intemperance or excesses, cruel treatment or outrages, public defamation, abandonment, an attempt on the other's life, status as a fugitive, and intentional non-support. Former La. C.C. arts. 138 and 139; *McLaughlin v. McLaughlin*, 29,313, p. 3 (La.App. 2 Cir. 4/2/97); 691 So.2d 834, 836.

\* \* \* \*

In brief, Mrs. Bourg argues the trial court erred in failing to find Mr. Bourg's actions were the cause of the dissolution of the marriage. However, this argument incorrectly places the burden of proof on Mr. Bourg. It is the claimant who must prove his or her own freedom from fault. *Vicknair v. Vicknair*, 237 La. 1032, 1035, 112 So.2d 702, 703 (1959).

\* \* \* \*

We next address Mrs. Bourg's argument that the trial court failed to find Mr. Bourg guilty of adultery. We note that even if the trial court had found sufficient proof of Mr. Bourg's adultery, Mrs. Bourg would still be required to show that she was free from fault in order to receive permanent alimony. See *Wynn v. Wynn*, 513 So.2d 489, 491 (La.App. 2 Cir.1987). Mr. Bourg's fault is relevant only to the extent that it would excuse or justify Mrs. Bourg's conduct. *Wynn v. Wynn*, 513 So.2d at 492. A wife is not deprived of permanent alimony simply because she was not totally blameless in the marital discord. *Pearce v. Pearce*, 348 So.2d at 77. Nor is she deprived of it by conduct which constitutes a reasonably justifiable response to the husband's initial fault. *Wynn v. Wynn*, 513 So.2d 491.

*Bourg v. Bourg*, 701 So. 2d 1378, 1380-81 (La. App. 1st Cir. 1997) (footnote omitted).

breakup of the marriage, not an after-the-fact event. This limitation on support-barring fault to fault committed prior to the filing of a proceeding to terminate the marriage eliminates the troublesome and frequently unfair treatment of the claimant spouse in the formulation and application of the fault rules to post-separation fault when that fault occurs after one of the parties files a proceeding to terminate the marriage.<sup>55</sup>

*B. Article 112*

*Art. 112. Determination of final periodic support*

*A. The court must consider all relevant factors in determining the entitlement, amount, and duration of final support. Those factors may include:*

- (1) The needs of the parties.*
- (2) The income and means of the parties, including the liquidity of such means.*
- (3) The financial obligations of the parties.*
- (4) The earning capacity of the parties.*

---

55. See *Billingsley v. Billingsley*, 618 So. 2d 562 (La. App. 2d Cir. 1993), and the cases cited therein for differing views on the nature of post-separation fault that bars permanent alimony. A perhaps unexpected result of the inclusion of the language "free from fault prior to the filing of a proceeding to terminate the marriage" is that adultery committed or a felony committed by a spouse and his sentence to death or imprisonment at hard labor after a divorce action has been instituted by either spouse no longer bars final periodic support, although they would be causes for a divorce under Louisiana Civil Code article 103 (2) and (3). The delay in obtaining a divorce in a Civil Code article 102 action increases possibility of this occurring. The article is explicit that the support-barring fault must occur before the filing of the proceeding to terminate the marriage. Comment (c), Revision Comments - 1997 to Louisiana Civil Code article 111 states:

(c) A condition for the award of final periodic support is the claimant's freedom from fault prior to the filing of a proceeding to terminate the marriage. Fault continues to mean misconduct that rises to the level of one of the previously existing fault grounds for legal separation or divorce. See C.C. Art. 160 (Rev. 1982 and 1986); *Adams v. Adams*, 389 So.2d 381 (La. 1980). See also *Allen v. Allen*, 648 So.2d 359 (La. 1994). However, unlike prior law this Article is explicit that the fault of the claimant that precludes an award of spousal support must have occurred prior to the filing of the "proceeding to terminate marriage"—for example, prior to the institution of an action for divorce.

The limitation of final spousal support barring fault to that occurring prior to the filing of a proceeding to terminate the marriage does not require that the action filed results in the termination of the marriage. For example, if a spouse files a Civil Code article 102 action for divorce and an action for final spousal support and thereafter commits adultery, and the other spouse obtains a divorce based upon that adultery, the adultery will not constitute a bar to final spousal support.

Left unresolved is the issue of the nature of fault that precludes final periodic support which occurs after the physical separation of the parties and prior to the filing of a proceeding to terminate the marriage. See *Billingsley*, 618 So. 2d at 565. This revision does not modify that jurisprudence. Also left undisturbed is the jurisprudence defining the nature of pre-separation fault that bars final spousal support, discussed in the preceding footnote.



(5) *The effect of custody of children upon a party's earning capacity.*

(6) *The time necessary for the claimant to acquire appropriate education, training, or employment.*

(7) *The health and age of the parties.*

(8) *The duration of the marriage.*

(9) *The tax consequences to either or both parties.*

*B. The sum awarded under this Article shall not exceed one-third of the obligor's net income.*

Prior Article 112, regulating permanent periodic alimony, mandated that the court *shall consider all the enumerated factors* in determining the entitlement and amount of alimony after divorce, plus any other circumstances that the court deems relevant.<sup>56</sup> In contrast, new Article 112 provides that in determining the entitlement, amount, and duration of final support, the court is mandated to

---

56. Civil Code article 112, prior to its amendment and re-enactment by 1997 La. Acts No. 1078, provided in part:

Art. 112. Alimony after divorce; permanent periodic; lump sum  
A.

\* \* \* \*

(2) In determining the entitlement and amount of alimony after divorce, the court shall consider:

(a) The income, means and assets of the spouses;

(b) The liquidity of such assets;

(c) The financial obligations of the spouses, including their earning capacity;

(d) The effect of custody of children of the marriage upon the spouse's earning capacity;

(e) The time necessary for the recipient to acquire appropriate education, training, or employment;

(f) The health and age of the parties and their obligations to support or care for dependent children; and

(g) Any other circumstances that the court deems relevant.

(3) In determining whether the claimant spouse is entitled to alimony, the court shall consider his or her earning capability, in light of all other circumstances.

It was held that permanent alimony under former Civil Code article 112 was not determined by the guidelines for alimony pendente lite under former Civil Code article 111. *Guillory v. Guillory*, 626 So. 2d 826 (La. App. 2d Cir. 1993).

The guidelines for an award of alimony pendente lite were the claimant's insufficiency of income for maintenance pending suit for divorce, the needs of the claimant spouse, and the means of the other spouse. Former Civil Code article 111. A spouse demonstrated a need for alimony pendente lite if the spouse established that he or she lacked sufficient income to sustain the style or standard of living that he or she enjoyed while the spouses lived together. *January v. January*, 649 So. 2d 1133 (La. App. 3d Cir. 1995). On the other hand, an award of permanent periodic alimony under former Civil Code article 112 required the consideration of seven specific statutory factors, as well as any other circumstances that the court deemed relevant. In the revision, the same basic distinction is observed between an interim periodic allowance and final spousal periodic support, although the guidelines for an interim periodic allowance are different from those for alimony pendente lite and the factors that may be considered for final periodic support are also different from those previously specified for permanent periodic alimony.

consider *all relevant factors*, and that those factors *may* include the nine listed factors. The court may consider factors that are not listed, provided they are relevant to the entitlement, amount, and duration of final support; it is not limited to considering the listed factors. The court need not consider all of the listed factors, as the consideration of all of the listed factors is no longer mandatory, but discretionary. The factors in the previous article were to be considered in determining the entitlement and amount of alimony after divorce; the factors in new article 112 and other relevant factors that may be considered are for the purpose not only of determining the entitlement and amount of final spousal support, but also its duration. This change in language, coupled with factor number (6), the time necessary for the claimant to acquire appropriate education, training, or employment, and the elimination of the word "permanent" in describing this type of spousal support, authorizes the court to award rehabilitative and other forms of support appropriate to the situation.<sup>57</sup> It gives needed flexibility to the courts and legislatively overrules *Teasdel v. Teasdel*<sup>58</sup> and *Hegre v. Hegre*.<sup>59</sup> For example, a fault-free former public school teacher who voluntarily gave up her teaching career to rear the couple's children may need additional hours of college credit to become recertified; a nursing student who had to discontinue her education may need two years to complete it in order to become a registered nurse; a spouse may need six months to complete a technical course to become self-supporting. In all these instances, both spouses are better served if the court has the authority and discretion to craft a spousal support award tailored to the particular circumstances of the spouses and designed to assist in the financial rehabilitation of the spouse whose habituation to economic dependency during the marriage has impaired his or her earning capacity.<sup>60</sup> Permitting a court to award rehabilitative spousal support for a specified period of time or until a specified event occurs is far better than relegating that spouse to a minimum wage job under an "earning capacity" test or a later after-the-fact determination of whether the spouse has had or should have had sufficient time and has expended sufficient effort to rehabilitate herself.<sup>61</sup>

---

57. Comment (c), Revision Comments - 1997 to La. Civ. Code art. 112. See text of Comment (c), *supra* note 34.

58. 493 So. 2d 1165 (La. 1986). See Comment (c), Revision Comments - 1997 to La. Civ. Code art. 112. See *supra* note 34 for text of Comment (c).

59. 483 So. 2d 920 (La. 1986). See Comment (c), Revision Comments - 1997 to La. Civ. Code art. 112. See *supra* note 34.

60. See the following cases for examples of the varying facts and circumstances considered by the courts in determining what effect the "earning capability" of the claimant spouse has on the entitlement to permanent alimony under prior Civil Code article 112A(3): *Baque v. Baque*, 664 So. 2d 782 (La. App. 3d Cir. 1995); *Fountain v. Fountain*, 644 So. 2d 733 (La. App. 1st Cir. 1994); *Ware v. Ware*, 461 So. 2d 467 (La. App. 5th Cir. 1984); *Johnson v. Johnson*, 452 So. 2d 322 (La. App. 4th Cir. 1984); *Silas v. Silas*, 399 So. 2d 779 (La. App. 3d Cir. 1981).

61. The unsatisfactory nature of an after-the-fact determination is demonstrated in *Ducote v. Ducote*, 573 So. 2d 560 (La. App. 5th Cir. 1991) and the other cases discussed in the opinion. See also *Slayter v. Slayter*, 576 So. 2d 1121 (La. App. 3d Cir. 1991).

Although there is change in the language and organization, the first seven factors are essentially the same as those contained in former article 112:<sup>62</sup> the needs; income; means (including the liquidity of the means);<sup>63</sup> financial obligations; earning capacity;<sup>64</sup> the health and age of the parties;<sup>65</sup> the effect of custody of children upon a party's earning capacity; and the time necessary for the claimant spouse to acquire appropriate education, training, or employment.

The eighth factor, the duration of the marriage, is new.<sup>66</sup> There is frequently a correlation between the length of a marriage and the economic dependence of one of the spouses resulting from that marriage.<sup>67</sup> This factor permits the court a means of assessing the degree to which a spouse's habitation to economic dependency upon the other spouse during the marriage has impaired

---

62. Comment (b), Revision Comments - 1997 to La. Civ. Code art. 112 states, in part: The first seven factors listed in this Article are essentially the same as those listed in former Civil Code Article 112 (rev.1982 & 1986).

63. The word "means" appears both in former Civil Code articles 111 and 112. It has been defined as signifying any available resources from which the wants of life may be supplied, including income and assets. *Goldberg v. Goldberg*, 698 So. 2d 63, 67 (La. App. 4th Cir. 1997); *Vorisek v. Vorisek*, 423 So. 2d 758 (La. App. 4th Cir. 1982); *Ward v. Ward*, 339 So. 2d 839 (La. 1976); *Bowsky v. Silverman*, 184 La. 977, 168 So. 121 (La. 1936). In former Civil Code article 112(A)(2)(a), that factor was described as "The income, means, and assets of the spouses." Means encompasses both income and assets. Although a person's current income is a part of his "means," earning capacity is not. *Ward*, 339 So. 2d at 842. The new corresponding factor (2) lists "The income and means of the parties. . . ." To this extent it is still redundant. As used, especially with the qualifying phrase, "including the liquidity of such means," it emphasizes that means other than income of a spouse should be considered in determining the entitlement, amount, and duration of final support.

64. Former Civil Code article 112(A)(2), formerly La. Civ. Code art. 160, as amended by 1979 La. Acts 72, § 1, effective June 29, 1979; redesignated as La. Civ. Code art. 112 by 1990 La. Acts 1008, § 8, and 1009, § 10, listed as factor (c), "The financial obligations of the spouses, including their earning capacity." Obviously, the earning capacity of a person is not an obligation of that person. In the revision, these two factors, the financial obligations of the parties and the earning capacity of the parties, have been separated and listed as two different factors, (3) and (4), that the court may consider. Although the earning capacity of the claimant spouse is a factor that may be considered by the court in determining the entitlement, amount, and duration of final spousal support, it is not clear whether it may be considered in awarding an interim allowance. See *infra* discussion at note 87.

65. Former Civil Code article 112(A)(2)(f) listed as a factor "The health and age of the parties and their obligations to support or care for dependent children." New factor (7) states "The health and age of the parties." Their obligations to support or care for dependent children are encompassed in new factor (3), "The financial obligation of the parties" and factor (5), "The effect of custody of children upon a party's earning capacity."

66. *Galbraith v. Galbraith*, 382 So. 2d 1042, 1043 (La. App. 2d Cir. 1980), held that under prior Civil Code article 148 "the brevity of the marriage" is not a factor to be considered in setting alimony pendente lite.

67. See *Vest v. Vest*, 579 So. 2d 1190 (La. App. 5th Cir. 1991) and *Manzanares v. Manzanares*, 656 So. 2d 726 (La. App. 5th Cir. 1995) for examples of this interrelationship of the length of the marriage and economic dependence of the wife.

the unemployed spouse's earning capacity.<sup>68</sup> This factor, when combined with the consideration of other factors, especially the health and age of the parties and, if applicable, the effect of custody of children of the marriage upon the custodian's earning capacity, enables the court to make a realistic assessment of the possibility of the economic rehabilitation of the claimant spouse by the acquisition of appropriate education and training and the possibility of gainful employment resulting from the additional education and training. The court may then award rehabilitative alimony for such duration and subject to conditions that are appropriate to that spouse's particular situation.

The ninth factor, the tax consequences to either or both parties, codifies prior jurisprudence.<sup>69</sup> Subject to the specific rules of the Internal Revenue Code and Regulations,<sup>70</sup> alimony is generally includible in the gross income of the recipient and allowable as a deduction in calculating the taxable income of the payor. These tax consequences to both spouses should be considered by the court in determining the amount of spousal support.

Two factors recommended by the Law Institute were not adopted by the legislature. The Law Institute recommended, as a factor to be considered in determining the entitlement, amount, and duration of final support, the standard of living of the parties during the marriage.<sup>71</sup> Several decisions had held that the lifestyle of the parties during the marriage is relevant in determining what is

---

68. Comment (d), Revision Comments - 1997 to La. Civ. Code art. 112. See *supra* note 36 for text of comment.

69. *Hester v. Hester*, 643 So. 2d 216 (La. App. 4th Cir.), *rev'd*, 647 So. 2d 1095 (1994), *writ denied*, 648 So. 2d 404 (1994); *Settle v. Settle*, 635 So. 2d 456 (La. App. 2d Cir. 1994); *Green v. Green*, 567 So. 2d 139 (La. App. 2d Cir. 1990); *Hamiter v. Hamiter*, 419 So. 2d 517 (La. App. 2d Cir.), *writ denied*, 423 So. 2d 1140 (1982); *Meyer v. Meyer*, 371 So. 2d 1304 (La. App. 4th Cir. 1979); *Bernhardt v. Bernhardt*, 283 So. 2d 226 (La. 1973).

70. See generally I.R.C. §§ 61(a)8, 71, 215 (West 1988 & Supp. 1997). Treasury Regulation § 1.71-1 (1960). I.R.C. § 71 provides:

§ 71. Alimony and separate maintenance payments

(a) General rule.—Gross income includes amounts received as alimony or separate maintenance payments.

(b) Alimony or separate maintenance payments defined.—For purposes of this section—

(1) In general.—The term "alimony or separate maintenance payments" means any payment in cash if—

(A) such payment is received by (or on behalf of) a spouse under a divorce or separation instrument,

(B) the divorce or separation instrument does not designate such payment as a payment which is not includible in gross income under this section and not allowable as a deduction under section 215,

(C) in the case of an individual legally separated from his spouse under a decree of divorce or of separate maintenance, the payee spouse and the payor spouse are not members of the same household at the time such payment is made, and

(D) there is no liability to make any such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse.

71. See *supra* note 35 for proposed legislation and proposed comment.

necessary for support of the party requesting permanent periodic alimony.<sup>72</sup> The proposal would have codified this jurisprudence.<sup>73</sup> Although rejected as a specific factor which the court may consider, courts are not prohibited by the new legislation from considering the standard of living of the parties as a relevant factor in determining the entitlement, amount, and duration of final support. The court is not limited to considering the nine listed factors; Article 112 mandates the court to consider *all relevant factors*, and that these factors *may* include the nine listed factors. However, courts may decide, because the legislature eliminated the standard of living of the parties as one of the specified statutory factors that may be considered, that this expresses the legislative intent that this factor may not be considered by the court.

The one-third limitation on permanent periodic alimony contained in former Civil Code article 112<sup>74</sup> has been carried forward and applied to final spousal support, but with the qualification that the one-third limitation shall be calculated on the net income of the payor.<sup>75</sup> Under the previous limitation, a court could consider both gross and net income of the payor, and use either the gross income or the net income in light of all of the circumstances of the particular record before it.<sup>76</sup> The court could consider the nature and amounts of the deductions from gross income in arriving at net income, the compulsory or voluntary nature of the deductions, whether the payor controlled the amount of deductions, and

---

72. *Guillory v. Guillory*, 626 So. 2d 826, 831-32 (La. App. 2d Cir. 1993); *Slayter v. Slayter*, 576 So. 2d 1121 (La. App. 3d Cir. 1991); *Gottsegen v. Gottsegen*, 503 So. 2d 588, 589 (La. App. 4th Cir. 1987); *Taylor v. Taylor*, 473 So. 2d 867, 871 (La. App. 4th Cir. 1985). As previously noted, neither the former nor the present Civil Code article 112 requires the court to consider only the factors listed in this article. Former Article 112 mandated that the court consider, in addition to the enumerated factors, any other circumstances that the court deems relevant. Present Civil Code article 112 mandates that the court consider all relevant factors, which may include the enumerated factors.

73. See *supra* note 35. The Law Institute proposal recognized the distinction between the standard of living of the parties being the primary consideration in the awarding of an interim allowance and its being just one of many factors that a court might consider in awarding final spousal support.

74. Former Civil Code article 112(A)(1) provided that permanent periodic alimony shall not exceed one-third of the income of the obligor spouse. It did not specify whether the limitation applied to gross or net income. The Louisiana State Law Institute recommended that this provision be carried forward. See *supra* note 37 for the proposed legislation and comment. The legislature did not adopt this recommendation.

75. Louisiana Civil Code article 112(B) provides: "The sum awarded under this Article shall not exceed one-third of the obligor's net income."

76. See the following cases, in which the one-third limitation was applied by the court to either gross or net income. *Hackett v. Hackett*, 617 So. 2d 1239 (La. App. 3d Cir. 1993); *Simon v. Simon*, 521 So. 2d 1255 (La. App. 3d Cir. 1988); *Fusilier v. Fusilier*, 464 So. 2d 1068 (La. App. 1st Cir. 1985); *Johnson v. Johnson*, 452 So. 2d 322 (La. App. 4th Cir. 1984); *Firstley v. Firstley*, 427 So. 2d 76 (La. App. 4th Cir. 1983); *Rodrigue v. Rodrigue*, 424 So. 2d 1185 (La. App. 1st Cir. 1982); *Super v. Super*, 397 So. 2d 1084 (La. App. 4th Cir.), *writ denied*, 399 So. 2d 583 (1981); *Shelton v. Shelton*, 395 So. 2d 899 (La. App. 2d Cir. 1981); *Ballard v. Ballard*, 367 So. 2d 1220 (La. App. 2d Cir. 1979).

any other facts reflected in the evidence that indicated whether the gross income or the net income should be the appropriate income upon which to calculate the one-third limitation. The flexibility given the trial court in the recommendation is preferable to the enacted rule.

A number of cases have held that the principal factor to consider in awarding permanent periodic alimony under former Civil Code article 112 was the relative financial positions of the parties,<sup>77</sup> although this factor was not listed in former Civil Code article 112. This jurisprudence is not affected by the revision of Civil Code article 112. In determining the entitlement, amount, and duration of final support, the court must consider all relevant factors, including those listed in the article. Like previous Article 112, present Article 112 does not limit the court to considering only those factors listed in the article.

### C. Article 113

*Art. 113. Interim periodic support allowance pending final support award.*

*Upon motion of a party or when a demand for final support is pending, the court may award a party an interim periodic allowance based on the needs of that party, the ability of the other party to pay, and the standard of living of the parties during the marriage. The obligation to pay interim periodic support shall not extend beyond one hundred eighty days from the rendition of judgment of divorce, except for good cause shown.*

As recommended by the Law Institute,<sup>78</sup> the purpose of an interim allowance was to temporarily maintain the status quo of the parties without severe economic dislocation until a determination of the amount of final periodic support could be made.<sup>79</sup> Therefore, under its proposal, an award of an interim

---

77. *Loyacano v. Loyacano*, 358 So. 2d 304 (La. 1978); *Widman v. Widman*, 631 So. 2d 689 (La. App. 3d Cir. 1994); *Slyater v. Slyater*, 576 So. 2d 1121 (La. App. 3d Cir. 1991); *Gottsegen v. Gottsegen*, 503 So. 2d 588 (La. App. 4th Cir. 1987); *Lopez v. Breaux*, 462 So. 2d 1333 (La. App. 3d Cir. 1985); *Boisfontaine v. Boisfontaine*, 357 So. 2d 90 (La. App. 4th Cir. 1978); *Phillpott v. Phillpott*, 321 So. 2d 797 (La. App. 4th Cir. 1975); *Frederic v. Frederic*, 302 So. 2d 903 (La. 1974); *Smith v. Smith*, 217 La. 646, 47 So. 2d 32 (La. 1950).

78. See *supra* note 38 for text of proposed Civil Code article 113 and proposed Comment (c) to proposed Civil Code article 113.

79. Comment (b), Revision Comments - 1997 to Louisiana Civil Code article 113 states:

(b) The purpose of an interim allowance is to maintain the status quo without unnecessary economic dislocation until a determination of the amount of final support can be made and until a period of time for adjustment elapses that does not exceed, as a general rule, one hundred eighty days after the judgment of divorce. Generally, the same purpose was attributed to alimony pendente lite under former Civil Code Article 111 by the court in *Arrendell v. Arrendell*, 390 So.2d 927, 930 (La. App. 2d Cir. 1980): "(I)t is designed to preserve and continue the status quo insofar as maintenance and support

allowance could be made only when a party was seeking final spousal support. As adopted by the legislature, the article provides that "[u]pon motion of a party or when a demand for final support is pending," the court may award an interim periodic allowance. This awkward language is intended to permit a claimant spouse to seek an interim allowance without also demanding final spousal support,<sup>80</sup> or to permit a claimant spouse to file an action for final spousal support and, as an incident to that action, seek an interim allowance until the entitlement to, and the amount of, the final spousal support has been determined.<sup>81</sup> The use of the disjunctive between the two unparallel phrases should not be interpreted to mean that an interim allowance may be sought by the use of summary proceedings, but final spousal support must be sought by ordinary proceedings. Either type of spousal support may be sought by the use of summary proceedings.<sup>82</sup> For example, an action for either type of support may be asserted in a summary or ordinary proceeding, or final spousal support may be sought in an ordinary proceeding and an interim allowance sought in a summary proceeding. The usual type of contradictory motion used for this purpose is the rule to show cause.<sup>83</sup> Under the legislative enactment, the

---

are concerned. It relates to facts as they have existed during the time the parties were living together and as they actually exist at the time the litigation commences, not to future possibilities and capabilities." Accord: *Ridings v. Ridings*, 595 So.2d 343, 345 (La. App. 2d Cir. 1992).

80. Comment (c), Revision Comments - 1997 to Louisiana Civil Code article 113 states:

(c) The phrase "[u]pon motion of a party" permits a party to seek an interim allowance without first demanding final spousal support. The reason for permitting an award of interim allowance without a pending claim for final spousal support is that a spouse may not be entitled to final support under Articles 111-112, but nonetheless may be entitled to an interim allowance under this Article.

81. Comment (d), Revision Comments - 1997 to Louisiana Civil Code article 113 states:

(d) The phrase "when a demand for final support is pending" permits a party to seek and be awarded an interim allowance when that party has filed a demand for final support. Under Article 111, a party may seek and be awarded final spousal support before or after the divorce judgment is rendered. See C.C. Art. 111, Comment (a).

82. Comment (f), Revision Comments - 1997 to Louisiana Civil Code article 113 states:

(f) Under Code of Civil Procedure Article 2592 (rev.1990), a demand for the relief authorized by this Article may be maintained by summary process. A rule to show cause is the usual vehicle.

Louisiana Code of Civil Procedure article 2592 provides, in part:

Art. 2592. Use of summary proceedings

Summary proceedings may be used for trial or disposition of the following matters only:

\* \* \* \*

(8) The original granting of, subsequent change in, or termination of custody, visitation, and support for a minor child; support for a spouse; injunctive relief; support between ascendants and descendants; use and occupancy of the family home or use of community movables or immovables; or use of personal property.

83. Louisiana Code of Civil Procedure article 963 provides:

Art. 963. Ex parte and contradictory motions; rule to show cause

If the order applied for by written motion is one to which mover is clearly entitled without supporting proof, the court may grant the order ex parte and without hearing the

institution of a proceeding for an interim allowance is not dependent upon the existence of a demand for final spousal support; a party may seek only an interim allowance.<sup>84</sup> The reason assigned for permitting the award of an interim allowance without a pending claim for final support is that a spouse may not be entitled to final spousal support<sup>85</sup> because of that spouse's fault, receipt of income, or means that would disqualify the claimant from receiving final spousal support; nonetheless, that spouse may be entitled to an interim allowance. To require a spouse to file for final spousal support in order to receive an interim allowance in a situation in which the spouse knows that he is not entitled to it would require a party to risk sanctions in order to obtain needed temporary support.<sup>86</sup>

---

adverse party.

If the order applied for by written motion is one to which the mover is not clearly entitled, or which requires supporting proof, the motion shall be served on and tried contradictorily with the adverse party.

The rule to show cause is a contradictory motion.

84. Comment (c), Revision Comments - 1997 to La. Civ. Code art. 113:

(c) The phrase "[u]pon motion of a party" permits a party to seek an interim allowance without first demanding final spousal support. The reason for permitting an award of interim allowance without a pending claim for final spousal support is that a spouse may not be entitled to final support under Articles 111-112, but nonetheless may be entitled to an interim allowance under this Article.

1993 La. Acts No. 261, § 6, effective Jan. 1, 1994, a part of the revision of the law of custody and child support, enacted Civil Code article 141, which contains classifications of child support as "an interim allowance" and "final support for a child," similar to the spousal support classification of "an interim periodic allowance" and "final spousal support" in 1997 La. Acts No. 1078, § 1, effective Jan. 1, 1998. It also contains a restriction on the awarding of an interim allowance of child support to those instances when a demand for final child support is pending. The Louisiana State Law Institute proposed the same structure and restriction in its spousal support proposal. Civil Code article 141 provides:

Art. 141. Child support; authority of court

In a proceeding for divorce or thereafter, the court may order either or both of the parents to provide an interim allowance or final support for a child based on the needs of the child and the ability of the parents to provide support.

The court may award an interim allowance only when a demand for final support is pending.

85. *Id.*

86. Louisiana Code of Civil Procedure articles 863 and 864 provide:

Art. 863. Signing of pleadings, effect

A. Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address.

B. Pleadings need not be verified or accompanied by affidavit or certificate, except as otherwise provided by law, but the signature of an attorney or party shall constitute a certification by him that he has read the pleading; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact; that it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.



The statutory factors listed in Civil Code article 112 that may be used by a court in determining the entitlement, amount, and duration of final spousal support are inapplicable to an interim periodic allowance under article 113, which is based upon the needs of the claimant, the ability of the party to pay, and the standard of living of the parties during the marriage.<sup>87</sup> The purpose of an interim allowance, like that of alimony pendente lite, is to maintain the status quo of both parties, if possible, until a determination of final spousal support can be made, if a request for final spousal support is pending,<sup>88</sup> or to provide

---

C. If a pleading is not signed, it shall be stricken unless promptly signed after the omission is called to the attention of the pleader.

D. If, upon motion of any party or upon its own motion, the court determines that a certification has been made in violation of the provisions of this Article, the court shall impose upon the person who made the certification or the represented party, or both, an appropriate sanction which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee.

E. A sanction authorized in Paragraph D shall be imposed only after a hearing at which any party or his counsel may present any evidence or argument relevant to the issue of imposition of the sanction.

F. A sanction authorized in Paragraph D shall not be imposed with respect to an original petition which is filed within sixty days of an applicable prescriptive date and then voluntarily dismissed within ninety days after its filing or on the date of a hearing on the pleading, whichever is earlier.

Art. 864 Attorney subject to disciplinary action

An attorney may be subjected to appropriate disciplinary action for a wilful violation of any provision of Article 863, or for the insertion of scandalous or indecent matter in a pleading.

See Rigby and Spaht, *supra* note 11, n.119, at 50-1. See also Rigby, *Divorce Forms*, Form 370(1), *supra* note 54, n.27, at 278, for a discussion of the jurisprudence interpreting and applying Louisiana Code of Civil Procedure article 863.

87. La. Civ. Code art. 113. See Rigby, *Divorce Forms*, Form 370(1), *supra* note 54, n.13, at 271 for a discussion of the jurisprudence concerning the purpose of and amount of alimony pendente lite under former Civil Code article 111. Under prior law, a spouse receiving alimony pendente lite was not required to show a change of circumstances in order to be entitled to either a higher or lower award of permanent alimony because "the awards are based upon two separate judgments and theoretical foundations." *Morris v. Morris*, 426 So. 2d 318, 320 (La. App. 2d Cir. 1983). The same is true of an interim allowance and final spousal support.

Under prior Civil Code articles 111 and 112, regulating alimony pendente lite and permanent alimony, respectively, the courts of appeal were divided on the issue of whether the earning capacity of the spouses, listed in article 112 as a factor to be considered by the court in determining the entitlement and amount of alimony after divorce, could be considered in determining the entitlement and amount of alimony pendente lite under article 111, which made no mention of earning capacity. See *Goldberg v. Goldberg*, 698 So.2d 63 (La. App. 4th Cir. 1997), for a good review of this division and the ambiguous action of the Louisiana Supreme Court in a *per curiam* granting of a writ and reversal in *Lindner v. Linder*, 508 So. 2d 57 (La. 1987). See also Kathleen Kay, *Alimony Pendente Lite and Earning Capacity*, 45 La. L. Rev. 79 (1984), for an earlier review of these divergent lines of cases. In the revision of Civil Code articles 111 and 112, that uncertainty has not been resolved.

88. Comment (b), Revision Comments - 1997 to La. Civ. Code art. 113. See *supra* note 79 for text. Alimony pendente lite had the same purpose. *Baggett v. Baggett*, 693 So. 2d 264 (La. App. 3d Cir. 1997); *Goldberg v. Goldberg*, 698 So. 2d 63, 66 (La. App. 4th Cir. 1997). Under former

temporary support for a limited period of time when no demand for final spousal support is pending.<sup>89</sup> In either case, the period of time for which an interim allowance may be awarded may not exceed, as a general rule, one hundred-eighty days after the rendition of a judgment of divorce.<sup>90</sup> For good cause shown, the maximum period for the payment of an interim support allowance may be extended beyond one hundred-eighty days after the rendition of the judgment of divorce.<sup>91</sup> For example, if a demand for final spousal support is pending and has been set for trial on a date which is two hundred days after the rendition of the judgment of divorce, the court could, upon motion of the claimant spouse, continue the interim allowance until the trial and adjudication of the demand for final spousal support. It should be noted that the one hundred-eighty-day period commences to run upon the *rendition* of the judgment of divorce, not its *signing*; however, see the Preliminary Statement to Chapter 3 of the Louisiana Code of Civil Procedure regulating the rendition of judgments, which states that "the majority of the Louisiana decisions are to the effect that a judgment of a trial court is not rendered until it is signed."<sup>92</sup> It is predicted that courts will soon

---

Civil Code article 111, a spouse demonstrated a need for alimony pendente lite if she demonstrated that she lacked sufficient income to maintain the style or standard of living that she enjoyed while residing with the other spouse during the marriage. *Dagley v. Dagley*, 695 So. 2d 521 (La. App. 4th Cir. 1997). The same test applies to an interim allowance under present Civil Code article 113.

89. Comment (c), Revision Comments - 1997 to La. Civ. Code art. 113. See *supra* note 80 for text.

90. Civil Code article 113; Comment (b), Revision Comments - 1997 to La. Civ. Code art. 113. See *supra* note 79 for text. Comment (e), Revision Comments - 1997 to La. Civ. Code art. 113 states:

(e) An award of interim allowance, whether or not there is a pending claim for final spousal support, may not extend beyond one hundred eighty days from the rendition of the judgment of divorce, unless the obligee shows good cause for an extension. Unlike alimony pendente lite, which was terminated by a judgment of divorce (see *Wascom v. Wascom*, 691 So. 2d 678 (La. 1997)), the claim for and termination of an interim allowance is independent of the divorce judgment.

91. La. Civ. Code art. 113; Comment (e), Revision Comments - 1997 to La. Civ. Code art. 113.

92. *Preliminary Statement* (1960 La. Acts No. 15), 4 West's Code of Civil Procedure, at 326. The Preliminary Statement refers to *Viator v. Heintz*, 201 La. 884, 10 So.2d 690 (1942), "where the authorities are collected."

The issue in *Viator* was when the ten-year prescriptive period commenced for judgments for money. At that time, Civil Code article 3547 provided that it commenced with "the rendition of such judgments." The supreme court held: "It is settled by jurisprudence that prescription begins to run when the judgment is signed, not when it is given or announced from the bench by the judge." *Viator*, 201 La. at 889, 10 So. 2d at 691. The Louisiana Code of Civil Procedure, a recommendation of the Louisiana State Law Institute, was adopted by the Louisiana Legislature by 1960 La. Acts No. 15, effective January 1, 1961.

Judge John T. Hood, Jr., writing in a Symposium on the Louisiana Code of Civil Procedure, noted that "[p]rior to the enactment of the Code of Civil Procedure, many procedural problems arose because of the uncertainty in Louisiana law as to what distinction, if any, should be made between the rendering and the signing of the judgment." John T. Hood, Jr., *Judgments: Book II, Title VI*, 35 Tul. L. Rev. 578 (1961). After discussing several options that were considered, Judge Hood concluded: "As finally adopted, the Code of Civil Procedure does not abolish the distinction between

be called upon to decide whether the one hundred-eighty-day interim allowance period commences on the day the divorce judgment is rendered or on the day that it is signed.<sup>93</sup>

Although an interim allowance and final spousal support are in some measure similar to alimony pendente lite and permanent periodic alimony, they are not the same concepts. The most significant difference is that the awarding and continuance of a periodic allowance or of final spousal support are completely independent of the termination of the marriage by the rendition of a judgment of divorce. An interim allowance may be awarded prior to the rendition of a judgment of divorce and, unlike alimony pendente lite, may

---

the rendering and the signing of a judgment. . . ." *Id.* at 581.

This view appears to be confirmed by Official Revision Comment (a) to article 1911 of the Code of Civil Procedure:

(a) While the rule of this article is substantially the same as the former rule on the subject, the articles in this Chapter make a radical change in the rules respecting the time when judgments may and shall be signed.

Under the articles in this Chapter, judgments are to be signed at the time of rendition or at any time thereafter. No time limit for the signing is imposed in any of these articles, but it is contemplated that all judgments will be signed within a reasonable time after rendition, which in turn depends upon the circumstances.

Judge Hood also chronicled the action taken to solve the problem of when the ten-year prescriptive period for money judgments commenced:

Some clarification of the law was necessary as to when the ten-year prescriptive period for judgments commences to run. This was a matter of substantive rather than procedural law, however, and the Council felt that it should not be incorporated into the Code of Civil Procedure. The necessary clarification was made, however, by amending Article 3547 of the Civil Code to provide, effective January 1, 1961, that the prescriptive period for judgments commences to run from the date of the "signing" rather than from the date of the "rendition" of such judgments. This amendment was included in the legislation which was proposed by the Council for implementing the Code of Civil Procedure.

Hood, *supra*, at 581-82. 1960 La. Acts No. 30, § 1, effective Jan. 1, 1961, referred to by Judge Hood, amended the first sentence of Civil Code article 3547 to read, "A money judgment rendered by a court of this state is prescribed by the lapse of the ten years from its signing, if rendered by a trial court, or from its rendition if rendered by an appellate court." This provision is now contained in Civil Code article 3501, enacted by 1983 La. Acts No. 173, § 1, effective Jan. 1, 1984. The first paragraph of that article reads:

A money judgment rendered by a trial court of this state is prescribed by the lapse of ten years from its signing if no appeal has been taken, or, if an appeal has been taken, it is prescribed by the lapse of ten years from the time the judgment becomes final.

See *Morris v. Schlumberger, Ltd.*, 436 So. 2d 1178, 1181 (La. App. 3d Cir. 1983), *Isbell v. Pankratz*, 284 So. 2d 841 (La. App. 4th Cir. 1973), and *Farrell v. Farrell*, 275 So. 2d 489 (La. App. 1st Cir. 1973), for continued discussion of when a judgment is "rendered."

The use of the term "the rendition of judgment of divorce" by the legislature, in fixing the commencement date of the maximum period of time for which an interim allowance may run, may revive the debate of the difference, if any, in the rendition of a judgment and the signing of the judgment.

93. Compare Civil Code article 113 with Civil Code article 117, in which the *signing* of a judgment commences the peremptive period of three years applicable to the right to claim spousal support after divorce.

continue although a judgment of divorce is thereafter rendered for a period not to exceed one hundred eighty days after the rendition of the judgment of divorce, unless it is extended for good cause shown. An interim allowance may be awarded at the time the judgment of divorce is granted. An interim allowance also may be sought and awarded after the rendition of a judgment of divorce. Likewise, final spousal support may be sought and awarded either before or after the rendition of a judgment of divorce, or may be awarded at the time of rendition of the judgment of divorce, whether or not an interim allowance is also sought or has been awarded. The previous codal and jurisprudential distinctions between pre-divorce alimony pendente lite and post-divorce permanent periodic alimony are not applicable to an interim allowance and to final spousal support.

The Law Institute proposal that an interim allowance could be awarded to a spouse only when that spouse was also seeking final spousal support contemplated a preliminary hearing at which the interim allowance would be fixed,<sup>94</sup> pending the hearing on the application for final spousal support. The claim for an interim allowance would be made incidental to a claim for final spousal support.<sup>95</sup> A subsequent hearing would be scheduled for final spousal

---

94. Depending upon the circumstances, this hearing to fix an interim allowance might be an abbreviated hearing or a full hearing. The Child Support Guidelines statute, La. R.S. 9:315-315.15 (1991), in Section 315.1(C)(5), provides for the entry of a child support award not conforming to the guidelines "when a full hearing on the issue of child support is pending but cannot be timely held." It further provides that, in such cases, "the Court at the full hearing shall use the provisions of this Part (the Child Support Guidelines statute) and may redetermine support without the necessity of a change of circumstances being shown." The Law Institute proposal would have permitted this type of abbreviated hearing if the circumstances dictated it. *See also* the provisions of Louisiana Revised Statutes 9:315.21, added by 1993 La. Acts No. 261, § 7, effective Jan. 1, 1994, regulating the effective date of a judgment awarding, modifying, revoking, or denying "an interim child support allowance award" and "final child support":

§ 315.21 Retroactivity of child support judgment

- A. Except for good cause shown, a judgment awarding, modifying, or revoking an interim child support allowance shall be retroactive to the date of judicial demand.
- B. (1) A judgment that initially awards or denies final child support is effective as of the date the judgment is signed and terminates an interim child support allowance as of that date.  
(2) If an interim child support allowance award is not in effect on the date of the judgment awarding final child support, the judgment shall be retroactive to the date of judicial demand, except for good cause shown.
- C. Except for good cause shown, a judgment modifying or revoking a final child support judgment shall be retroactive to the date of judicial demand.
- D. Child support of any kind, except that paid pursuant to an interim child support allowance award, provided by judgment debtor from the date of judicial demand to the date the support judgment is signed, to or on behalf of the child for whom support is ordered, shall be credited to the judgment debtor against the amount of the judgment.
- E. In the event that the court finds good cause for not making the award retroactive to the date of judicial demand, the court may fix the date on which the award shall commence.

95. *See* proposed La. Civ. Code art. 113 and proposed Comment (c) to La. Civ. Code art. 113. *See supra* note 38 for text.

support, at which the fault of the claimant spouse, if any, and the application of the Article 112 factors could be urged by the spouses. Although similar in some respects, they are dissimilar to the former proceedings for alimony pendente lite and permanent alimony in that the rendition of a judgment of divorce does not affect the status of either an interim allowance or final spousal support.<sup>96</sup> The legislative elimination of the requirement that an interim allowance could be awarded to a spouse only when that spouse was also seeking final spousal support presents strategy issues. Unless otherwise terminated, an interim support allowance continues for a period ending one hundred-eighty days from the rendition of a judgment of divorce, unless extended for good cause shown.<sup>97</sup> When an interim allowance is sought and allowed without a pending action for final spousal support, no procedural mechanism is provided for the other spouse to provoke a final support hearing, in which he may raise the issue of the claimant spouse's fault and the application of the Civil Code article 112 factors. The claimant spouse has no incentive to ask for final spousal support at the time the action for an interim allowance is instituted. Unless the other spouse acts affirmatively, the interim allowance may continue well past the rendition of the judgment of divorce, a period which is longer than the period for which an award of alimony pendente lite would run under *Wascom*.<sup>98</sup>

What action can the payor spouse take to prevent this? One possibility is his filing of a rule to show cause against the claimant spouse either to fix the amount of the final spousal support or to decree that the claimant spouse is not entitled to final spousal support because she is not free from fault in specified particulars.<sup>99</sup> There does not seem to be any reason why the rule could not seek alternative relief based upon inconsistent or mutually exclusive legal or factual bases under Louisiana Code of Civil Procedure article 892. The rule to show cause could seek a judgment that the claimant spouse is not entitled to final spousal support because she was not free from fault, is not in need of final spousal support, or the obligor spouse does not have the income or other means to pay final spousal support, and, in the alternative, ask that the final spousal support of the claimant spouse be fixed pursuant to Civil Code article 112. It may be argued that because the claimant spouse has not at that time asserted any claim for final spousal support, there is no justiciable issue posed for the trial court to consider, because the claimant spouse's fault or freedom from fault and

---

96. Comment (a), Revision Comments - 1997 to La. Civ. Code art. 111. See *supra* note 47 for text.

97. La. Civ. Code art. 113; La. Civ. Code art. 113 cmts. (b), (e). See *supra* notes 79 and 90 for text of the comments.

98. *Wascom v. Wascom*, 691 So. 2d 678 (La. 1997).

99. Louisiana Revised Statutes 9:321(B)(1) provides that a judgment that denies final spousal support is effective as of the date the judgment is rendered and terminates an interim support allowance as of that date. La. R.S. 9:321(B)(1) (Supp. 1998).

The use of summary proceedings for this purpose is authorized by Louisiana Code of Civil Procedure article 2592(1) and (8) both as an incidental question arising in the course of judicial proceedings and in a proceeding for the original granting of or a change in spousal support.

need for final spousal support are not at issue until and unless that spouse asks for final spousal support. The first, fourth, and fifth circuits have held that no justiciable issue as to the wife's fault is presented in a divorce proceeding in which the wife was not seeking permanent alimony.<sup>100</sup> On the other hand, the second circuit has held that a court could decree a spouse free from fault even if that spouse was not currently seeking permanent alimony.<sup>101</sup> The reasoning in the latter case is applicable to this situation. Both spouses should be entitled to have the eligibility of the claimant spouse for final spousal support determined, even though that spouse has not yet asserted such a claim, for the reasons given in *Kaplan*. The payor spouse is also entitled to have the final spousal support determined as soon as possible, when it is due, so as to terminate the interim allowance.<sup>102</sup> This may be an awkward and cumbersome procedure,<sup>103</sup> but the payor spouse must be provided a mechanism to raise these issues. Otherwise, the claimant spouse could file an action for an interim allowance without also asking for final spousal support, and the payor spouse would have no recourse to have the spousal support adjusted or terminated until or unless the claimant spouse sought final spousal support shortly before the

---

100. See *Arnoult v. Arnoult*, 494 So. 2d 561 (La. App. 5th Cir.), *rev'd on other grounds*, 498 So. 2d 749 (1986); *Latino v. Latino*, 400 So. 2d 1152 (La. App. 1st Cir. 1981); *Brady v. Brady*, 388 So. 2d 57 (La. App. 1st Cir. 1980); *Vignes v. Vignes*, 311 So. 2d 615 (La. App. 1st Cir. 1975); *Nieto v. Nieto*, 276 So. 2d 362 (La. App. 4th Cir. 1973); *Wagner v. Wagner*, 248 So. 2d 96 (La. App. 4th Cir. 1971); *Zarrilli v. Zarrilli*, 129 So. 2d 568 (La. App. 4th Cir. 1961).

101. *Kaplan v. Kaplan*, 453 So. 2d 1218 (La. App. 2d Cir. 1984), relying on *Thomason v. Thomason*, 355 So. 2d 908 (La. 1978), and its prior discussions in *Vail v. Vail*, 390 So. 2d 978 (La. App. 2d Cir. 1980) and *Jordan v. Jordan*, 408 So. 2d 952 (La. App. 2d Cir. 1981), held that a spouse was entitled to a determination that he was free from fault in causing the dissolution of the marriage, although his fault was not at issue in the divorce suit because he was not seeking alimony in the divorce proceedings. The court noted that if a spouse who does not seek alimony in the divorce proceedings should later decide that he is in need of alimony, much of the case would have to be retried at the later date if the fault issue is not initially determined, and that it is desirable to decide the fault issue during the initial divorce proceedings while the facts establishing that party's fault or lack thereof are still relatively fresh and more easily proved.

102. Normally, the interim allowance award, based upon the standard of living of the parties during the marriage, will be greater in amount than the final spousal support, the amount of which is governed by the Civil Code article 112 factors. Therefore, even if the claimant spouse is deemed entitled to final spousal support, the payor spouse has the incentive to have the interim allowance terminated and the final spousal support begin as soon as possible, because Louisiana Revised Statutes 9:321(B)(1) provides that a judgment that initially awards final spousal support is effective as of the date the judgment is rendered and terminates an interim spousal allowance as of that date. The payor spouse has even a greater need and incentive if the claimant spouse has been guilty of fault that will bar an award of final spousal support.

103. Normally, the spouse seeking support institutes the action for support alleging eligibility and need. That spouse has the burden of proving freedom from fault when fault is an issue. *Doane v. Benenate*, 671 So. 2d 523 (La. App. 4th Cir. 1996); *Unkel v. Unkel*, 651 So. 2d 382 (La. App. 2d Cir. 1995). Granting to the payor spouse the right to file a rule to show cause against the claimant spouse to have that spouse decreed to be ineligible for final spousal support or to decree the amount of it should not change the burden of proof imposed on the claimant spouse to show eligibility and need.

expiration of the one hundred-eighty days after the rendition of the judgment of divorce.

On the other hand, if the payor spouse acts promptly in filing the rule to show cause, if an early trial date can be secured in this summary proceeding, and if the court finds the claimant spouse not to be free from fault or is not otherwise entitled to final spousal support because of lack of need, inability of the payor spouse to pay, or for some other reason, it may well be that the interim allowance will terminate sooner than would an alimony pendente lite award. A judgment that denies final spousal support is effective as of the date the judgment is rendered and terminates an interim spousal support award as of that date.<sup>104</sup> The same is true if the payor spouse does not contend that the claimant spouse is not entitled to final spousal support, but files a rule to show cause against the claimant spouse to fix the amount of the final spousal support. Like a judgment that denies final spousal support, a judgment that initially awards final spousal support is effective as of the date the judgment is rendered and also terminates an interim spousal allowance as of that date.<sup>105</sup> In both instances, the judgment either awarding or denying final spousal support terminates the interim allowance. Under the supreme court's interpretation of Louisiana Code of Civil Procedure article 3943 in *Malone v. Malone*,<sup>106</sup> no suspensive appeal lies from a judgment denying, modifying, or terminating a support award.<sup>107</sup> Therefore,

104. La. R.S. 9:321(B)(1) (Supp. 1998) provides:

A judgment that initially awards or denies final spousal support is effective as of the date the judgment is rendered and terminates an interim spousal allowance as of that date.

105. La. R.S. 9:321(B)(1) (Supp. 1998).

106. 282 So. 2d 119 (La. 1973).

107. In *Malone*, the issue was "whether the delay for perfecting an appeal from a judgment denying a motion for termination of alimony is thirty days as provided by C.C.P. 3943 or ninety days as provided by C.C.P. 2087." *Malone*, 282 So. 2d at 119. The supreme court held: "Therefore, we hold that appeals from judgments awarding, denying, modifying or terminating alimony or custody are governed by the provisions of C.C.P. 3943." *Id.* at 121. Louisiana Code of Civil Procedure article 3943, as amended by 1993 La. Acts No. 261, § 3, effective Jan. 1, 1994, provides:

An appeal from a judgment awarding custody, visitation, or support of a person can be taken only within the delay provided in Article 3942. Such an appeal shall not suspend execution of the judgment insofar as the judgment relates to custody, visitation or support.

Subsequent cases have applied the *Malone* interpretation of Louisiana Code of Civil Procedure article 3943 to conclude that only a devolutive appeal, and not a suspensive appeal, will lie from a judgment terminating a support award. *Derbes*, in applying the *Malone* interpretation to the nature of the appeal allowed from a judgment denying alimony, observed:

Admittedly, the wording of article 3943 could be read to limit the restriction to devolutive appeals only to judgments that actually award alimony in some amount. Here, appellant received no award. However, judicial interpretations of article 3943 have consistently held that its mandate of devolutive appeals and prohibition of suspensive appeals for judgments concerning permanent alimony applies whether permanent alimony is awarded or denied by the trial court. *E.g., Malone v. Malone*, 282 So.2d 119, 121 (La.1973); *Donaldson v. Donaldson*, 389 So.2d 1375, 1376 (La.App. 3 Cir.), writ denied, 394 So.2d 617 (La.1980).

the claimant spouse is relegated to a devolutive appeal from the judgment terminating the interim allowance. Of course, the devolutive appeal does not suspend the effect of the judgment terminating the interim allowance pending the appeal. If final spousal support is denied, the claimant spouse will receive no spousal support during the appeal of the judgment denying final spousal support, regardless of whether an interim allowance has been in effect. If final spousal support is awarded, the claimant spouse will receive that type of support, not an interim allowance, during the appeal of the judgment awarding final spousal support, whether the claimant spouse or the payor spouse appeals, as the appeal by either spouse is a devolutive appeal, not a suspensive appeal.<sup>108</sup>

It might be possible for the payor spouse to prevent the issuance of an award of an interim allowance, when the payee spouse has sought it, by filing a rule against the claimant spouse to show cause why there should not be judgment decreeing her not to be entitled to final spousal support because she was at fault. This rule could be made returnable either prior to the return date of the claimant spouse's rule for an interim allowance, if the trial docket permits, or be made returnable on the same date and time as the rule for an interim allowance. If the issue of the claimant spouse's fault is tried prior to the claimant spouse's rule for an interim allowance, and the claimant spouse is found to be at fault, it would appear that this would preclude the award of an interim allowance. If an interim allowance has not been awarded, the judgment decreeing that the claimant spouse is not entitled to final spousal support does not technically terminate an interim support allowance, as none had been awarded. It would appear, however, that since a judgment either awarding or denying final spousal support terminates an existing interim support allowance, that a judgment either denying or awarding final spousal support should also terminate the *right* to an interim allowance, although that right has not been reduced to judgment.

If the payor spouse makes the return date of his rule the same as the return date of the claimant spouse's rule for an interim allowance, the following result might be possible. The claimant spouse's rule for an interim allowance is tried first, and an interim allowance awarded. Immediately thereafter, the payor spouse's rule is tried. If either the claimant spouse is found to be at fault and thus not entitled to final spousal support, or is found to be free from fault and in need and is awarded final spousal support, the judgment terminates the interim allowance as of that date.<sup>109</sup> The judgment awarding the interim allowance would normally be retroactive to the date of judicial demand<sup>110</sup> for it, and the judgment either awarding or denying the final spousal support, is effective as of

---

Derbes v. Derbes, 462 So. 2d 302, 305 (La. App. 3d Cir. 1985). See also Morris v. Morris, 426 So. 2d 318, 319, 320 (La. App. 2d Cir. 1983).

108. La. Code Civ. P. art. 3943; Malone v. Malone, 282 So. 2d 119 (La. 1973).

109. La. R.S. 9:321(B)(1) (Supp. 1998).

110. La. R.S. 9:321(A) (Supp. 1998) provides: "Except for good cause shown, a judgment awarding, modifying, or revoking an interim spousal allowance shall be retroactive to the date of judicial demand."



the date that judgment is rendered and terminates the interim allowance as of that date.<sup>111</sup> Hence, in this instance the interim allowance would run only from the date of judicial demand for the interim allowance to the date of the judgment either decreeing that the claimant spouse is not entitled to final spousal support or awarding the final spousal support.<sup>112</sup>

*D. Article 114*

*Art. 114. Modification or termination of award of periodic support*  
*An award of periodic support may be modified if the circumstances of either party change and shall be terminated if it has become unnecessary. The subsequent remarriage of the obligor spouse shall not constitute a change of circumstance.*<sup>113</sup>

An interim allowance and final spousal support are each a specie or type of periodic spousal support. Either may be modified if the circumstances of either party change and either shall be terminated if it becomes unnecessary.<sup>114</sup> This article supplements and clarifies the similar provisions of former Civil Code article 112.<sup>115</sup> The revised article distinguishes between the discretionary modification of spousal support if the circumstances of either party change and its mandatory revocation if it becomes unnecessary. It is not intended to affect either the requirements of Louisiana Revised Statutes 9:311<sup>116</sup> that the change in circumstances must occur between the time of the previous award and the time of the motion for modification of the award, or the jurisprudential requirement that the change be substantial.<sup>117</sup> This article applies to all forms of spousal

---

111. La. R.S. 9:321(B)(1) (Supp. 1998). See *supra* note 104 for text.

112. *Id.*

113. La. Civ. Code art. 114 (1997).

114. *Id.*

115. Comment (a), Revision Comments - 1997 to La. Civ. Code art. 114. Former Civil Code article 112(A)(4) provided, "Permanent period alimony shall be revoked if it becomes unnecessary and terminates if the spouse to whom it has been awarded remarries or enters into open concubinage." Although the article was couched in mandatory terms, the jurisprudence was uniform in holding that a trial court has great discretion in determining whether changed circumstances justify a modification of an alimony award. See *Richardson v. Richardson*, 631 So. 2d 114 (La. App. 3d Cir. 1994).

116. La. R.S. 9:311(A) (1991) provides:

An award for support shall not be reduced or increased unless the party seeking the reduction or increase shows a change in circumstances of one of the parties between the time of the previous award and the time of motion for modification of the award.

117. Comment (b), Revision Comments - 1997 to La. Civ. Code art. 114. See *Roberts v. Roberts*, 700 So. 2d 1099 (La. App. 5th Cir. 1997); *Hester v. Hester*, 699 So. 2d 1099 (La. App. 4th Cir. 1997); *Phillips v. Phillips*, 673 So. 2d 333 (La. App. 1st Cir. 1996) (child support); *Anderson v. Anderson*, 504 So. 2d 624 (La. App. 4th Cir. 1987). Generally, the conversion of a non-liquid asset into a liquid asset is not considered to be a change of circumstances. *Nugent v. Nugent*, 533 So. 2d 1370 (La. App. 3d Cir. 1988); *Roberts*, 700 So. 2d at 1101. The spouse who requests either

support, including rehabilitative or other fixed-duration awards.<sup>118</sup> If an award of rehabilitative spousal support for a fixed term is made to allow the recipient to complete a designed course of study or training and the recipient spouse abandons the course of study or training, the obligor spouse may seek an amendment or termination of the award of rehabilitative spousal support. If the recipient spouse is unable to complete the course of study or training within the expected time when the award was made, the recipient spouse may seek to have the award extended, and the court has the discretion, for good cause shown, to do so.<sup>119</sup>

A new provision was added by the legislature to proposed Article 114: the subsequent remarriage of the obligor spouse shall not constitute a change of circumstances. This may impact a long-standing jurisprudential rule. The supreme court in *Marcus v. Burnett*<sup>120</sup> held in a case involving child support that taking into consideration the living expenses incident to the second marriage of the husband, as well as his income and the income of his second wife, was consistent with Civil Code article 231. Later, in *Sonfield v. Deluca*,<sup>121</sup> the supreme court held that the expenses of the husband's second marriage, like other circumstances, should be taken into account in determining the amount of permanent periodic alimony he must pay to his first wife. However, the court stated that it was unable to see how these expenses could completely negate his obligation to support his ex-wife.<sup>122</sup> *Nowlin v. Nowlin*<sup>123</sup> stated the rule to be that although the expenses of a second marriage should be considered in an action to reduce permanent periodic alimony, the paying spouse's remarriage alone is not enough to warrant a reduction if the receiving spouse is still in need.

---

a reduction or an increase in alimony bears the burden of proof to demonstrate a significant change in the financial conditions of one of the spouses, or both, so as to justify the change in alimony. *Roberts*, 700 So. 2d at 1101.

118. Comment (b), Revision Comments - 1997 to La. Civ. Code art. 114 states, in part: "The recipient of a rehabilitation or other fixed-duration periodic award may also seek to have it modified or extended under this Article. See Comment (c) to Article 112, *supra*." Comment (c) to La. Civ. Code art. 112 is set forth at *supra* note 34.

119. Comment (c), Revision Comments - 1997 to La. Civ. Code art. 112. See *supra* note 34 for text; Comment (b), Revision Comments - 1997 to La. Civ. Code art. 114. See *supra* note 118 for text.

120. 282 So. 2d 122 (La. 1973). The effect of this decision, insofar as it involved child support, has been generally modified by the subsequent adoption of the Child Support Guidelines statute, La. R.S. 9:315-315.15 (1991), and in particular, with respect to the second spouse's income, by La. R.S. 9:315(6)(c) (1991):

(c) The court may also consider as income the benefits a party derives from expense-sharing or other sources; however, in determining the benefits of expense-sharing, the court shall not consider the income of another spouse, regardless of the legal regime under which the remarriage exists, except to the extent that such income is used directly to reduce the cost of a party's actual expenses.

121. 385 So. 2d 232 (La. 1980).

122. *Id.* at 234.

123. 535 So. 2d 825, 827 (La. App. 2d Cir. 1988).

*Towell v. Towell*<sup>124</sup> held that remarriage and adoption of the children of the second wife do not automatically give a parent the right to seek reduction of a pre-existing child support or alimony obligation.

It is not clear whether the second sentence in Article 114, added by the legislature, means that the fact of remarriage of the obligor does not constitute a change of circumstance, in which case the prior jurisprudence does not seem to be affected, or whether the additional expenses of the obligor resulting from his remarriage and the income of the new spouse may not be considered a change of circumstances, in which case the prior jurisprudence would be legislatively modified. Recognizing the current status of divorces and remarriages, the better interpretation of this language is that the fact of remarriage of the obligor does not in and of itself constitute a change of circumstance,<sup>125</sup> but that the court may consider the additional expenses, as well as the additional income that may be available, due to the second marriage.

A change in the circumstances of either party and the lack of a necessity for continued spousal support are causes for the modification or termination of that support, respectively. These provisions are not self-operative; relief must be sought and judicially obtained in order for the spousal support obligation to be modified or terminated for these causes. In an action brought under Article 114 to modify an interim periodic allowance, the inquiry should be limited to whether there has been a sufficient change in the factors listed in Article 113 to justify a modification or termination of the award of interim periodic support; the Article 112 factors should play no part in that determination.<sup>126</sup> The same applies to an action to modify or terminate an award for final spousal support; the Article 113 factors should play no part in that determination. This same distinction in the initial awarding of an interim allowance, and final spousal support has been previously discussed in this article:<sup>127</sup> the Article 113 factors should be considered for an initial award of an interim allowance, and the Article 112 factors, as well as the Article 111 freedom-from-fault requirement, for an award of final spousal support.

---

124. 640 So. 2d 810, 812 (La. App. 3d Cir. 1994).

125. See *Jordan v. Jordan*, 406 So. 2d 322 (La. App. 3d Cir. 1981).

126. In determining whether there has been a change in circumstances justifying a modification or termination of either an interim allowance or an award of final periodic support, the court should look to the relevant factors in Civil Code articles 112 or 113, respectively, depending upon whether the award to be modified or terminated is an interim award or a final award, in determining whether or not there has been a sufficient change in one or more of those factors justifying either a modification or a termination of spousal support. Comment (b), Revision Comments - 1997 to La. Civ. Code art. 114.

127. See *supra* discussion in note 56. Of course, in both situations, the basic tests for the amount of spousal support, the needs of the claimant spouse and the ability of the other spouse to pay, contained in Civil Code article 111, should be considered. See *supra* notes 50 and 51 for the interrelationship of these Article 111 tests and the Articles 112 and 113 factors, respectively.

*E. Article 115**Art. 115 Extinguishment of spousal support obligation*

*The obligation of spousal support is extinguished upon the remarriage of the obligee, the death of either party, or a judicial determination that the obligee has cohabited with another person of either sex in the manner of married persons.*

In contrast to Article 114, Article 115 provides that if the obligee of the support obligation remarries or either party dies, the spousal support obligation, whether or not it has been reduced to judgment, is automatically extinguished without the need for judicial intervention.<sup>128</sup> It is not necessary to seek and obtain judicial relief.<sup>129</sup> Periodic spousal support terminates upon remarriage of the recipient, even if that marriage is not a valid one and is absolutely or relatively null.<sup>130</sup> If it is *judicially* determined that the obligee has cohabited with another person of either sex in the manner of married persons, the

---

128. Comment (b), Revision Comments - 1997 to La. Civ. Code art. 115 states:

(b) Under this Article, the obligation to pay periodic spousal support, whether or not it has been reduced to judgment, is automatically extinguished without need of judicial intervention, by the death of either party or the remarriage of the obligee. Similarly, the obligation of support is extinguished when it is judicially determined that the recipient has cohabited with another person in the manner specified in this Article. See comment (e) to this Article, *infra*. These rules represent extensions of prior jurisprudential and statutory holdings relative to alimony awards. E.g., *McConnell v. Theriot*, 295 So.2d 60 (La. App. 4th Cir. 1974), writ denied 296 So.2d 834 (La. 1974) (remarriage of obligee); *Cortes v. Fleming*, 307 So.2d 611 (La. 1974) (death of payor); *Succession of Carter*, 32 So.2d 44 (La. App. 1st Cir. 1947) (same).

129. *Id.*

130. Comments (c) and (d), Revision Comments - 1997 to La. Civ. Code art. 115 state:

(c) This Article does not affect the holding of *Keeney v. Keeney*, 30 So.2d 549, 211 La. 585 (1947), to the effect that periodic spousal support terminates when the recipient contracts another marriage even when that marriage is absolutely null. That holding is, if anything, more appropriate now than when it was rendered. The supreme court based its decision in the *Keeney* case on the absurdity of the results of the opposite holding—including the possibility that a party to a null marriage might continue to receive alimony from his former spouse even while enjoying the de facto economic benefits of the subsequent null union. After the date of that decision, however, the law created a stronger basis for it; namely the legal right of a putative spouse to receive permanent alimony from the person with whom he contracted the null marriage. See C.C. Art. 152 (rev. 1993); *Galbraith v. Galbraith*, 396 So.2d 1364 (La. App. 2d Cir. 1981), writ denied 401 So.2d 974 (La. 1981); *Cortes v. Fleming*, 307 So.2d 611 (La. 1974). That jurisprudential rule has not been disturbed by this revision; so the vast majority of divorced spouses who have contracted invalid second marriages (i.e., those who have done so in good faith) will continue to be protected without the necessity of their former legal spouses being kept perpetually subject to contingent support liability.

(d) A relatively null subsequent marriage terminates the obligation of support under this Article because such a union produces all of the civil effects of marriage until it is declared null. See C.C. Art. 97 (rev. 1987).

obligation of spousal support, whether or not reduced to judgment, is also extinguished.<sup>131</sup> Former Civil Code article 112 used the term "enters into open concubinage."<sup>132</sup> The jurisprudence defined "concubinage" as a relationship of sexual content in which a man and woman live together as husband and wife in a state of affairs approximating marriage.<sup>133</sup> That relationship was considered "open" when the relationship was not disguised, concealed, or made secret by the parties.<sup>134</sup> Mere proof of sexual acts was not sufficient for a finding of open concubinage.<sup>135</sup> The phrase "cohabited . . . with another person of either sex in the manner of married persons" means to live together in a sexual relationship of some permanence.<sup>136</sup> It does not mean just acts of sexual intercourse or other sexual activity.<sup>137</sup> Proving the absence of concealment is no longer required.<sup>138</sup> The quoted phrase does not mean that the parties are legally capable of contracting marriage. A sexual relationship may exist between persons of the same sex. Therefore, persons of the same sex, who are prohibited from marrying, may cohabit "in the manner of married persons."<sup>139</sup> Upon a

131. Comment (e), Revision Comments - 1997 to La. Civ. Code art. 115 states:

(e) As used in this Article the phrase "cohabited . . . in the manner of married persons" means to live together in a sexual relationship of some permanence regardless of whether the cohabitants are prohibited from marrying. See Article 89. It does not mean just acts of sexual intercourse. The use of this quoted phrase obviates the difficulties of proving absence of concealment that were inherent in the term "open concubinage" used in former Civil Code Article 112 (as amended by 1982 La. Acts, No. 580). See, e.g., *Petty v. Petty*, 560 So.2d 629 (La. App. 4th Cir. 1990); *Gray v. Gray*, 451 So.2d 579 (La. App. 2d Cir. 1984), writ denied 457 So.2d 13 (La. 1984). The phrase "in the manner of married persons" does not require that the cohabitants be capable of contracting marriage under Chapter I of Title IV of this Code.

132. Former Civil Code article 112(A)(4) provided: "Permanent periodic alimony . . . terminates if the spouse to whom it has been awarded remarries or enters into open concubinage."

133. *Thomas v. Thomas*, 440 So. 2d 879, 881 (La. App. 2d Cir. 1983); *Gray v. Gray*, 451 So. 2d 579, 583-84 (La. App. 2d Cir. 1984); *Polk v. Polk*, 626 So. 2d 1233, 1237 (La. App. 4th Cir. 1993). *Thomas* described open concubinage as a quasi-marital status or relationship. *Thomas*, 440 So. at 884.

134. *Thomas*, 440 So. 2d at 881 and the jurisprudence discussed therein.

135. *Polk*, 626 So. 2d at 1237.

136. Comment (e), Revision Comments - 1997 to La. Civ. Code art. 115. See *supra* note 131. The jurisprudence defining concubinage as a relationship of sexual content in which the parties live together in a state of affairs approximating marriage applies to the relationship described in this article. See *supra* notes 133-135.

137. The jurisprudence defining concubinage as more than just acts of sexual intercourse or other sexual activity is not affected and applies to the relationship described in this article. See *supra* notes 134 and 135.

138. The jurisprudence requiring that the concubinage be "open," that is, not concealed, does not apply to the relationship described in this article. See *supra* notes 134 and 135.

139. Comment (e), Revision Comments - 1997 to La. Civ. Code art. 115. See *supra* note 131. Section 8 of 1997 La. Acts No. 1078, added by the Legislature, provides:

Section 8. In accordance with Joint Rule No. 10 of the Joint Rules of the Senate and House of Representatives, the Louisiana State Law Institute is hereby urged and directed to include comments consistent with the provisions of this Act, including their effect on

judicial determination that the obligee of the spousal support obligation has entered into this type of relationship with another person of either sex, the obligation of spousal support is extinguished. This is in contrast to the remarriage of the obligee or the death of either party, in which cases the occurrence of the event itself extinguishes the obligation of spousal support, whether or not the other party is aware of the event. No judicial declaration that the event itself occurred is required for the obligation of spousal support to be extinguished in those cases. However, in the case of the obligee cohabitating with another person of either sex in the manner of married persons, it is the judicial determination that this event has occurred that extinguishes the obligation of spousal support. Absent the judicial determination, the obligation is not extinguished. Former Civil Code article 112A(4) did not contain this distinction. It provided that permanent periodic alimony "terminates if the spouse to whom it has been awarded remarries or enters into open concubinage."<sup>140</sup>

Former Civil Code article 160, after its amendment in 1964, provided that permanent alimony "terminates if the wife remarries."<sup>141</sup> This phrase was interpreted to mean that the alimony terminated "without the necessity of any formal amendment of an outstanding judgment providing" for the alimony,<sup>142</sup> and that the alimony was "terminated by the operation of law."<sup>143</sup> The distinction observed in the revision is based upon the relative certainty in most cases of determining whether a person has remarried, through the examination of public records and other sources, and the relative uncertainty in many cases of determining whether a person has cohabited with another person in the manner of married persons. The latter inquiry is fact-intensive.<sup>144</sup> Although it is the

---

recent jurisprudence and specifically the application of Civil Code Article 115 to a homosexual relationship despite the definition of marriage as provided in Civil Code Article 86.

Louisiana Civil Code article 86 defines marriage as a legal relationship between a man and a woman that is created by civil contract and provides that the relationship and the contract are subject to special rules prescribed by law.

Civil Code article 89 provides that persons of the same sex may not contract marriage with each other. A purported marriage contracted in contravention of Civil Code article 89 is an absolute nullity. La. Civ. Code art. 94 cmt. (a). A purported marriage between parties of the same sex does not produce any civil effects. La. Civ. Code art. 96. Therefore, it cannot give rise to a putative marriage. Comment (d), Revision Comments - 1987 to La. Civ. Code art. 89.

140. See *supra* note 132 for the text of this article.

141. Prior to its amendment by 1964 La. Acts No. 48, Civil Code article 160 provided, in part: "This alimony shall be revocable in case it should become unnecessary and in case the wife should contract a second marriage." 1964 La. Acts No. 48 amended this portion of Civil Code article 160 to provide: "This alimony shall be revoked if it becomes unnecessary, and terminates if the wife remarries."

142. *Miller v. Miller*, 308 So. 2d 379, 381 (La. App. 1st Cir.), writ granted, 313 So. 2d 240 (1975), amended on other grounds, 321 So. 2d 318 (1975).

143. *McConnell v. Theriot*, 295 So. 2d 60, 64 (La. App. 4th Cir.), writ denied, 296 So. 2d 834 (1974); *Blankenship v. Blankenship*, 382 So. 2d 982, 983 (La. App. 1st Cir. 1980).

144. See *Polk v. Polk*, 626 So. 2d 1233 (La. App. 4th Cir. 1993), writ denied, 634 So. 2d 381 (1994); *Scott v. Scott*, 579 So. 2d 1094 (La. App. 2d Cir. 1991); *Petty v. Petty*, 560 So. 2d 629 (La.

judicial determination that the obligee of the spousal support obligation has cohabited with another person of either sex in the manner of married persons that extinguishes the obligation of spousal support, the extinguishment of the spousal support obligation is retroactive to the date of judicial demand.<sup>145</sup>

#### F. Article 116

##### *Art. 116. Modification of spousal support obligation*

*The obligation of final spousal support may be modified, waived, or extinguished by judgment of a court of competent jurisdiction or by authentic act or act under private signature duly acknowledged by the obligee.*

The Law Institute recommended that the obligation of spousal support may not be extinguished by consent unless an action for divorce is pending or a judgment of divorce has been rendered.<sup>146</sup> It recommended that consent must be expressed in an authentic act or act under private signature duly acknowledged by the obligee, and the act must receive court approval, which must be granted if the court finds that the obligee understands the legal consequences of the extinction of the obligation. The purpose was to prevent imposition on one spouse by the other. The legislature substantially modified the proposed article. As enacted, the article provides that the obligation of final spousal support may be modified, waived, or extinguished by judgment of a court of competent jurisdiction, or by authentic act or act under private signature duly acknowledged by the obligee. The Law Institute proposal applied to both an interim allowance and final spousal support.<sup>147</sup> The article, as enacted, applies only to the

---

App. 4th Cir. 1990); Theriot v. Theriot, 546 So. 2d 589 (La. App. 1st Cir.), writ denied, 550 So. 2d 635 (1989); Gray v. Gray, 451 So. 2d 579 (La. App. 2d Cir.), writ denied, 457 So. 2d 13 (1984); Thomas v. Thomas, 440 So. 2d 879 (La. App. 2d Cir.), writ denied, 443 So. 2d 597 (1983); and Cook v. Cook, 436 So. 2d 743 (La. App. 3d Cir. 1983), for illustrations of the evidentiary issues involved in determining whether or not a person has lived in open concubinage.

145. La. R.S. 9:321 (Supp. 1998), as amended and reenacted by 1997 La. Acts No. 1078, § 2, provides, in part:

A. Except for good cause shown, a judgment awarding, modifying or revoking an interim spousal support allowance shall be retroactive to the date of judicial demand.

\* \* \* \*

C. Except for good cause shown, a judgment modifying or revoking a final spousal support judgment shall be retroactive to the date of judicial demand.

\* \* \* \*

F. A judgment extinguishing an obligation of spousal support owed to a person who has cohabited with another person of either sex in the manner of married persons shall be retroactive to the date of judicial demand.

146. See *supra* note 39 for proposed Civil Code article 116 and the proposed Comment to proposed Civil Code article 116.

147. *Id.*

obligation of final spousal support, not an interim periodic allowance.<sup>148</sup> Unlike the Law Institute proposal,<sup>149</sup> the article applies not only to the waiver or extinguishment of final spousal support, but also its modification.

The article recognizes that final spousal support is not a matter of public order about which the parties are forbidden to contract under Civil Code article 7.<sup>150</sup> Subject to the possible restrictions discussed later, the parties are permitted to contract or agree to the modification, waiver, or extinguishment of the obligation of final spousal support at any time before or during marriage, and after divorce.<sup>151</sup> However, a form requirement is imposed, which may be satisfied by judgment of a court of competent jurisdiction or by an authentic act or act under private signature duly acknowledged.<sup>152</sup> Since final spousal support may be awarded prior to divorce,<sup>153</sup> the article narrows the public policy proscription against the waiver of spousal support during marriage announced in *Holliday v. Holliday*<sup>154</sup> and may narrow the freedom of spouses

---

148. Revision Comment - 1997 to La. Civ. Code art. 116 states, in part: "This Article applies to the modification or extinguishment of final spousal support. It does not apply to an interim allowance."

149. Proposed Comment (f) to the proposed La. Civ. Code art. 116 in House Bill No. 2053, Regular Session 1997, stated:

This Article does not apply to an agreement that fixes, modifies, or otherwise imposes conditions or limitations on spousal support that do not amount to a present or future extinguishment of it.

Civil Code article 116, as adopted, provides that the obligation of final spousal support may be "modified, waived, and/or extinguished" in the manner provided.

150. Revision Comment - 1997 to La. Civ. Code art. 116 states:

This Article recognizes that final spousal support is not a matter of public order about which couples are forbidden to contract under Civil Code Article 7. Instead, spouses are permitted to contract concerning final spousal support at any time before or during marriage, or after divorce. See *McAlpine v. McAlpine*, 679 So.2d 85 (La.1996). However, this Article does impose a requirement of form that may be satisfied by authentic act or act under private signature duly acknowledged by the obligee. This Article applies to the modification or extinguishment of final spousal support. It does not apply to an interim allowance.

Louisiana Civil Code article 7 provides: "Persons may not by their judicial acts derogate from laws enacted for the protection of the public interest. Any act in derogation of such laws is an absolute nullity."

151. Revision Comment - 1997 to La. Civ. Code art. 116.

152. *Id.*

153. *Id.*

154. 358 So. 2d 618 (La. 1978). *Holliday* held:

It is the public policy of this state as expressed in the provisions of La. Civil Code art. 119, 120 and 148 that a husband should support and assist his wife during the existence of the marriage. It is against the public interest to permit the parties to enter into an antenuptial agreement relieving him of this duty imposed by law. The policy involved is that conditions which affect entitlement to alimony pendente lite cannot be accurately foreseen at the time antenuptial agreements are entered, and the public interest in enforcement of the legal obligation to support overrides the premarital anticipatory waiver of alimony.



to contract concerning spousal support after divorce announced in *McAlpine v. McAlpine*.<sup>155</sup>

*Holliday* correctly held that the obligation of fidelity and the duty of support and assistance which spouses owe each other terminate only upon dissolution of the marriage by death or divorce.<sup>156</sup> It also correctly held that an order to pay alimony pendente lite is merely an enforcement of this obligation of spousal support, which does not terminate until the marriage is dissolved by death or by divorce.<sup>157</sup> The statutory spousal support scheme is now different. An interim allowance may be awarded during the marriage, at the time the marriage is terminated by divorce, or after the divorce. Final spousal support may also be awarded during the marriage, at the time the marriage is terminated by divorce, or thereafter. An interim allowance may be awarded although no final spousal support is sought. Final spousal support may be awarded although no interim allowance is sought or awarded.

Article 116 authorizes the modification, waiver, or extinguishment of final spousal support only.<sup>158</sup> The article recognizes that final spousal support is not

---

We, therefore, conclude that the provision of the antenuptial agreement in which plaintiff-wife waived her right to alimony pendente lite in the event of a judicial separation from bed and board is null and void as against public policy. Hence, the court of appeal erred in recognizing the validity of the waiver as a bar to plaintiff's right to alimony pendent lite.

*Id.* at 620 (footnotes omitted).

155. 679 So. 2d 85 (La. 1996). *McAlpine* held:

Our holding today is in accordance with the majority of states that now hold antenuptial waivers of permanent alimony are not per se invalid as against public policy. As stated by two family law commentators, since 1970, with the advent of no-fault divorce and the changes in society that such laws represent, public policy has changed and the traditional rule that prenuptial waivers of permanent alimony were void *ab initio* has given way to the more realistic view that such agreements are valid and enforceable under certain conditions. Freed & Walker, *Family Law in the Fifty States: An Overview (1985-1986)*, 19 Fam.Law Q. 331, 438. Rather than encouraging divorce, these agreements provide couples with the opportunity to plan for the future and safeguard their financial interests. Without this option, potential spouses may choose to live together informally without the benefit of marriage. Thus, these agreements may actually encourage marriage in some instances.

#### CONCLUSION

We conclude that permanent alimony is not a law enacted for the public interest. Rather, it was enacted to protect individuals, i.e., not-at-fault divorced spouses in need.

Thus, the prohibition found in article 7 of the Civil Code does not apply.

*McAlpine*, 679 So. 2d at 92-93.

156. *Holliday*, 358 So. 2d at 620. These obligations were imposed by Civil Code of 1870 articles 119 and 120. Article 120 was repealed by 1985 La. Acts 1985 No. 271. The provisions of Article 119 were restated in Article 98, as revised by 1987 La. Acts No. 886, § 1, effective Jan. 1, 1988, as follows: "Married persons owe each other fidelity, support and assistance." These spousal duties are matters of public order from which the spouses may not derogate by contract. Comment (e), Revision Comments - 1987 to La. Civ. Code art. 98.

157. *Holliday*, 358 So. 2d at 620.

158. Revision Comment - 1997 to La. Civ. Code art. 116. See *supra* note 150.

a matter of public order.<sup>159</sup> Therefore, it is clear that a conventional waiver or extinguishment, in the form prescribed, of final spousal support, both during the marriage and thereafter, is permitted. Insofar as a waiver or extinguishment of the obligation of final spousal support is permitted during the marriage, the article legislatively overrules *Holliday v. Holliday*.<sup>160</sup> Insofar as it permits the waiver of post-divorce final spousal support, it codifies *McAlpine v. McAlpine*.<sup>161</sup>

Since the article does not refer to interim periodic support, it appears that the *Holliday* proscription against the waiver of the obligation of spousal support during marriage still applies to that obligation insofar as that obligation is enforced through an interim periodic allowance, but does not still apply to the obligation of spousal support during the marriage insofar as that obligation is enforced through final spousal support.

On the other hand, since *McAlpine* held that post-divorce support is not a matter of public order, it appears that the post-divorce obligation of support may be conventionally waived or extinguished, in the manner provided, both insofar as it is enforced through a final spousal support award under Civil Code article 112 and through an interim allowance under Civil Code article 113. It may be argued, however, that the legislature expressly limited the waiver or extinguishment to final spousal support and thereby intended that interim support was a matter of public order and was not subject to waiver or extinguishment for any period, either during marriage or after divorce. If this view of legislative intent is adopted, the revision prohibits a waiver of a post-divorce interim allowance and narrows *McAlpine* to the waiver of post-divorce final spousal support.

Ordinarily, waiver is the intentional relinquishment of a known and existing right, power, or privilege, and waiver occurs when there is an existing right, a knowledge of its existence, and an actual intention to relinquish it, or conduct so inconsistent with the intent to enforce the right as to induce a reasonable belief that the existing right has been relinquished.<sup>162</sup>

---

159. *Id.*

160. See *supra* note 154 for the text of the *Holliday* opinion.

161. See *supra* note 155 for the text of the *McAlpine* opinion.

162. *Holt v. Aetna Cas. & Surety Co.*, 680 So. 2d 117, 128 (La. App. 2d Cir. 1996). However, the court in *Holliday v. Holliday*, 358 So. 2d 618, 618-19 (La. 1978), stated that the wife in "an antenuptial agreement . . . waived and relinquished . . . alimony. . . ." In *McAlpine v. McAlpine*, 679 So. 2d 85, 86 (La. 1996), the court stated that "antenuptial agreement . . . provided for . . . a waiver of alimony. . . ." Apparently, in neither case was the issue of the waiver of a future right raised by the parties. The supreme court, in *Daigle*, found no constitutional or legislative prohibition against the settlement and release of a future potential wrongful death claim arising from Louisiana Civil Code article 2315.2, the settlement and release occurring after the injury had been sustained but before the tort victim's demise. *Daigle v. Clemco Indus.*, 613 So. 2d 619 (La. 1993). The Court pointed out that, as a general rule, future things may be the object of a contract, Louisiana Civil Code article 1976, and that the only future thing excepted from this rule is the succession of a living person, Louisiana Civil Code articles 1976 and 2454.

The extinguishment of an obligation implies the existence of a present obligation. An obligation can be extinguished in several ways: by compensation,<sup>163</sup> confusion,<sup>164</sup> novation,<sup>165</sup> performance by the obligor,<sup>166</sup> or by a third person,<sup>167</sup> remission of the debt,<sup>168</sup> tender and deposit,<sup>169</sup> and peremption.<sup>170</sup> The remission of a debt is gratuitous in principle, but is considered a sort of indirect liberality not subject to the form requirements for donations.<sup>171</sup> In Louisiana, remission of a debt is substantially similar to a common law release.<sup>172</sup>

Arguably, in using the terms "waiver" and "extinguishment," which generally refer to existing rights and obligations, the legislature did not intend to broaden the Law Institute proposal that only a presently-existing spousal support obligation could be extinguished, but intended only to change the manner in which it could be extinguished.<sup>173</sup> If this interpretation of legislative intent is accepted, Article 116 represents a narrowing of the right to waive or extinguish a spousal support obligation. It would permit only the waiver or extinguishment of a presently-existing final support obligation, which would limit a waiver or extinguishment to one executed during the marriage or thereafter. This interpretation of legislative intent would bar a prenuptial waiver of final spousal support and a waiver of an interim allowance at any time, thus narrowing the scope of *McAlpine*.

Additionally, the article permits a modification of a final spousal support obligation. The intent of the legislature in this respect is not clear. The obligation of spousal support exists independently of a judgment recognizing and enforcing that obligation.<sup>174</sup> Modification in this context may mean that the parties are

---

163. La. Civ. Code art. 1893.

164. La. Civ. Code art. 1903.

165. La. Civ. Code art. 1879.

166. La. Civ. Code art. 1854.

167. La. Civ. Code art. 1855.

168. La. Civ. Code art. 1888 provides: "A remission of debt by an obligee extinguishes the obligation. That remission may be express or tacit."

169. La. Civ. Code art. 1869.

170. La. Civ. Code art. 3458.

171. Comment (b), Revision Comments - 1984 to La. Civ. Code art. 1888. *Arledge v. Bell*, 463 So. 2d 856, 858 (La. App. 2d Cir. 1985). Civil Code articles 1536-1558 outline the form requirements for donations inter vivos. The right to receive spousal support is an incorporeal movable. La. Civ. Code art. 473. A person may donate inter vivos only present property; the donation of future property is null. La. Civ. Code art. 1528. Civil Code article 1532 provides that this prohibition does not extend to donations regulated by Chapter 8 (articles 1734-1742) and Chapter 9 (articles 1743-1755) of Title II of Book III of the Civil Code.

172. Comment (d), Revision Comments - 1984 to La. Civ. Code art. 1888.

173. Revision Comments - 1997 to La. Civ. Code art. 116 states, in part: "... spouses are permitted to contract concerning final spousal support at any time before or during marriage, or after divorce. See *McAlpine v. McAlpine*, 679 So. 2d 85 (La. 1996)." However, comments are not the law. 1997 La. Acts No. 1078, § 7 provides: "The headings, source lines, and comments in this Act are not part of the law and are not enacted into law by virtue of their inclusion in this Act."

174. Civil Code articles 115 and 116 regulate the modification and extinguishment of the obligation of spousal support. Article 115 states the causes for the extinguishment by operation of

free, prior to marriage and prior to the existence of a final spousal support obligation, to contractually modify for themselves the statutory provisions regulating the entitlement to future final spousal support, its amount and duration, the circumstances under which the amount may be reduced or increased, and the circumstances under which final spousal support will terminate. It may also mean that the parties, during marriage and after divorce, may conventionally agree on the amount, duration, modification, and termination of an existing final spousal support obligation. In this sense, it is analogous to the former lump sum alimony provisions of former Civil Code article 112B.<sup>175</sup> It may also mean that the parties may conventionally modify a judgment of final spousal support in an agreement conforming to the form requirements without obtaining a modification of the spousal support judgment itself.<sup>176</sup>

It is probable that the legislature, in using the phrase "modified, waived or extinguished," intended the following.<sup>177</sup> In using the word "modified," it

---

law of both types of spousal support. Article 116 permits the waiver, modification, or extinguishment of the obligation of final spousal support by contract of the parties. These articles deal with the obligation itself, not the judicial recognition, quantification, or enforcement of the obligation of spousal support by an award or judgment of spousal support. On the other hand, Civil Code article 114 deals with the award, or judgment, of spousal support and stipulates the legal causes for which such an award, or judgment, of periodic support may be modified or terminated.

175. Former La. Civ. Code art. 112(B) provided:

B. (1) The court may award alimony in lump sum in lieu of or in combination with permanent periodic alimony when circumstances require it or make it advisable, and the parties consent thereto. In determining whether to award lump sum alimony, the court shall consider the needs of the claimant spouse and the financial condition of the paying spouse. In awarding lump sum alimony in lieu of or in combination with permanent periodic alimony, the court shall consider the criteria enumerated in Paragraph A of this Article, except the limitation to one-third of the paying spouse's income, in determining entitlement and amount of alimony.

(2) A lump sum award may consist of immovable or movable property or may be a monetary award payable in one payment or in installments.

(3) A judgment which awards lump sum alimony shall vest in the claimant spouse a right which is neither terminable upon either spouse's remarriage or death, nor subject to modification.

See *Ellefson v. Ellefson*, 616 So. 2d 221 (La. App. 5th Cir. 1993); *Angelica v. Angelica*, 608 So. 2d 255 (La. App. 5th Cir. 1992).

176. The general rule in Louisiana is that a judgment providing for the payment of alimony remains in full force and effect in favor of the party to whom it is awarded until the party liable applies to the court and obtains a modification, *Pisciotta v. Crucia*, 224 La. 862, 71 So. 2d 226 (1954). However, a number of cases have recognized the right of the parties to modify or terminate alimony payments by conventional agreements. See *Robinson v. Robinson*, 561 So. 2d 966 (La. App. 4th Cir. 1990) and the cases cited at 967-68; *Czech v. Earley*, 573 So. 2d 252 (La. App. 3d Cir. 1990). These cases have held that the parties must clearly agree to the termination or modification of the alimony award and that the party relying on such an agreement has the burden of proving the agreement. See *Robinson*, 561 So. 2d at 968.

177. Any search for the meaning of a statutory provision and the intent of the legislature in enacting it must, of course, be guided by the following Civil Code rules of interpretation and others that may be applicable:

meant that an existing final spousal support obligation may be changed in some manner, but the obligation continues to exist, or subsist. The word "waived" may refer to the relinquishment of a future final spousal support right by the obligee,<sup>178</sup> so that the right and correlative obligation of final spousal support never arise or come into existence. "Extinguished" clearly refers to the extinction of an existing obligation.<sup>179</sup>

Article 116 provides that one method by which the obligation may be modified, waived, or extinguished is by judgment of a court of competent

Art. 9. Clear and unambiguous law

When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.

Art. 10. Language susceptible of different meanings

When the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law.

Art. 11. Meaning of words

The words of law must be given their generally prevailing meaning.

Words of art and technical terms must be given their technical meaning when the law involves a technical matter.

Art. 12. Ambiguous words

When the words of a law are ambiguous, their meaning must be sought by examining the context in which they occur and the text of the law as a whole.

Art. 13. Laws on the same subject matter

Laws on the same subject matter must be interpreted in reference to each other.

La. Civ. Code arts. 9, 10, 11, 12, 13. The jurisprudential application of these rules of interpretation must also be considered. *Moore* held:

First, always, is the question whether the legislature has directly spoken to the precise question at issue. If the intent of the legislature is clear, that is the end of the matter; for the courts must give effect to the unambiguously expressed intent of the legislature if its application does not lead to absurd consequences. La.Civ.Code art. 9; *Ramirez v. Fair Grounds Corp.*, 575 So.2d 811 (La. 1991). Cf. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984).

*Moore v. Gencorp, Inc.*, 633 So. 2d 1268, 1270 (La. 1994). *Thomas* held: "Since the language of the statute is susceptible of different meanings, conflicting and/or illogical ones, we are authorized by La.Civ.Code Ann. art. 10 (West 1993) to interpret it as having the meaning that best conforms to its purpose." *Thomas v. Insurance Corp. of America*, 633 So. 2d 136, 140 (La. 1994). *Roberts* held:

When a law is clear and unambiguous and its application does not lead to absurd consequences, the law must be applied as written. La.C.C. art. 9; La.R.S. 1:3, 1:4. However, when the language of a statute is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law. La.C.C. art. 10; *Thomas v. Insurance Corp. of Amer.*, 93-1856 (La.2/28/94), 633 So.2d 136. An ambiguous statute must be construed in a manner to impart the meaning intended by the legislature and to avoid absurd results. *Lopez v. City of Shreveport*, 449 So.2d 1184 (La. App. 2d Cir.), writ denied 452 So.2d 175 (1984). To aid in interpreting an ambiguous statute, the court may look to legislative history to discern the intent of the legislature. *State, Dept. of Social Serv. v. Parker*, 595 So.2d 815 (La. App. 2d Cir. 1992).

*Roberts v. State Farm Mut. Auto. Ins. Co.*, 662 So. 2d 821, 824 (La. App. 2d Cir. 1995).

178. But see *supra* textual discussion at note 162.

179. See *supra* discussion at notes 163-172.

jurisdiction.<sup>180</sup> The latter phrase is unnecessary. Any action taken by a court without proper jurisdiction is void and has no effect.<sup>181</sup> Judgments may result from contested proceedings or as the result of the bilateral contract of the parties, commonly known as a consent judgment.<sup>182</sup> Both types of judgments are subject to vices of form or substance.<sup>183</sup> Additionally, consent judgments, unlike other final judgments which are rendered against parties without their consent, may be annulled for error of fact, error of the principal cause of the agreement, or other vices of consent.<sup>184</sup> A consent judgment based upon the agreement of the parties is null if the agreement upon which it is based is a contravention of a rule of public order. Thus, an agreement respecting spousal support, child support, and any other matter that is found to be in contravention of a rule of public order is not immunized from nullity because it has been reduced to judgment. Both the agreement and the judgment are null.<sup>185</sup>

180. La. Civ. Code art. 116.

181. La. Code Civ. P. art. 3 provides, in part: "A judgment rendered by a court which has no jurisdiction over the subject matter of the action or proceeding is void." See also *State v. L.B.*, 676 So. 2d 179 (La. App. 1st Cir. 1996); *Colacurcio v. Ledet*, 662 So. 2d 65 (La. App. 4th Cir. 1995); *Barry v. Barry*, 606 So. 2d 1391 (La. App. 2d Cir. 1992); *State, Dept. of Social Servs. v. Parker*, 595 So. 2d 815 (La. App. 2d Cir. 1992).

182. *Plaquemines Parish Gov't v. Getty Oil Co.*, 673 So. 2d 1002 (La. 1996); *Martin Forest Prods. v. Grantadams*, 616 So. 2d 251 (La. App. 2d Cir. 1993). *Martin Forest Products* held:

A consent judgment is a bilateral contract wherein the parties adjust their differences by mutual consent and thereby put an end to a law suit with each party balancing the hope of gain against the fear of loss. *Williams v. Williams*, 586 So.2d 658, 661 (La.App.2d Cir.1991). A consent judgment has binding force from the presumed voluntary acquiescence of the parties, not from adjudication by the court. *Black Collegiate Services, Inc. v. Ajubita*, 600 So.2d 761, 764 (La.App. 4th Cir.1992), writ denied, 606 So.2d 544 (La.1992). Thus, consent judgments, as opposed to contested judgments, may be invalidated for unilateral error as to a fact which was a principal cause for making the contract, where the other party knew or should have known it was the principal cause. However, a consent judgment needs no cause or consideration other than an adjustment of differences and a desire to set at rest all possibility of litigation. *Williams*, 586 So.2d at 661; *Succession of Simmons*, 527 So.2d 323, 325 (La.App. 4th Cir.1988), writ denied, 529 So.2d 12 (La.1988).

*Martin Forest Products*, 616 So. 2d at 253.

183. La. Code Civ. P. arts. 2001-2006; *Estate of Sylvester*, 631 So. 2d 614 (La. App. 3d Cir. 1994); *Williams v. Williams*, 586 So. 2d 658 (La. App. 2d Cir. 1991).

184. *Williams*, 586 So. 2d 658; *Estate of Sylvester*, 631 So. 2d 614; *Borchardt v. Carline*, 617 So. 2d 970 (La. App. 4th Cir. 1993). Consent may be vitiated by error, fraud, or duress. La. Civ. Code art. 1948. See La. Civ. Code arts. 1949-1964.

185. *Lacassagne v. Lacassagne*, 430 So. 2d 818 (La. App. 5th Cir. 1983); *Dubroc v. Dubroc*, 388 So. 2d 377 (La. 1980); *Ward v. Ward*, 339 So. 2d 839 (La. 1976); *Walder v. Walder*, 159 La. 231, 105 So. 300 (La. 1925); *Succession of Watt*, 111 La. 937, 36 So. 31 (La. 1903).

In *Watt*, the supreme court, finding that Civil Code article 301 provides that no cause excuses a parent from the obligation of accepting the tutorship of his children, held that a judgment appointing a person other than the father of minor children as the tutor of the children because the father was unwilling to be appointed and refused to comply with the legal requirements for qualification of natural tutors, to be null:

Agreements respecting spousal support are most frequently entered into while divorce proceedings and their incidental matters are pending. If the agreement constitutes a transaction or compromise, as it most frequently does, because there is a dispute concerning the entitlement to or amount of final spousal support, the form requirements of that type of agreement must be observed for the transaction or compromise to be enforceable.<sup>186</sup> For a transaction or compromise agreement to be enforceable, the terms of the compromise agreement must be either reduced to writing and signed by the parties<sup>187</sup> or be recited in open court in a manner capable of being transcribed

---

The Civil Code is clear in its provisions that the father cannot, for any cause whatever, be excused from the obligation of accepting the tutorship of his children. Article 301. This is an enactment in the interest of public order. Acts done in contravention of it are stricken with nullity. Civ. Code, arts. 11, 12; *James v. Meyer*, 41 La. Ann. 1100, 7 South. 618.

*Watt*, 111 La. at 938, 36 So. at 31. In *Walder*, the court held, in a later proceeding for child support, that a consent judgment pursuant to an agreement of the parties that forever relieved the father "of any and every obligation to support" their minor children, was "absolutely null and void:"

The duty of the father to support his minor children is a continuing obligation. He cannot escape it. A decree which purports to enable him to escape that duty is beyond the power of a court to render. It would be contrary to public policy to give such a decree effect.

*Walder*, 159 La. at 236, 105 So. at 302. In *Lacassagne*, a consent judgment was entered pursuant to a settlement of the community which provided that a stipulated amount of child support for a son would terminate on a specified date (three months after the boy's 13th birthday) and provided a fixed amount of child support for a daughter until she "reaches her majority." The court held the agreement "to be repugnant" and refused to enforce it. It held that the consent judgment was "open to modification." *Lacassagne*, 430 So. 2d at 821.

186. Civil Code article 3071 provides the form requirements for a transaction or compromise: Art. 3071. Transaction or compromise, definition

A transaction or compromise is an agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent, in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing.

This contract must be either reduced into writing or recited in open court and capable of being transcribed from the record of the proceeding. The agreement recited in open court confers upon each of them the right of judicially enforcing its performance, although its substance may thereafter be written in a more convenient form.

187. Although Civil Code article 3071 does not state that the writing must be signed by the parties, Civil Code article 1837 provides that an act under private signature need not be written by the parties, but must be signed by them. Also, the jurisprudence expressly requires that all parties to a compromise agreement must sign the agreement. *Sullivan v. Sullivan*, 671 So. 2d 315, 318 (La. 1996); *Scott v. Green*, 621 So. 2d 1 (La. App. 4th Cir. 1993) and the cases cited therein. *Sullivan*, 671 So. 2d at 317, stated:

In *Felder v. Georgia Pacific Corp.*, 405 So.2d 521 (La. 1981), this court addressed the writing requirement of Article 3071. We stated therein:

The Code requires that compromise agreements be in writing, by implication signed by both parties. . . .

\* \* \* \*

While the statute itself does not provide for the consequences of failure to reduce a compromise agreement to writing, this Court has previously held that a compromise

from the record of the proceeding.<sup>188</sup> A minute entry which gave no description of the terms of the settlement, but was merely a transcription of the clerk's handwritten summary of the proceedings (the tape of the proceedings had been misplaced), was held to be insufficient.<sup>189</sup> The oral dictation of the terms of a compromise agreement to a court reporter in one of the attorney's offices during a deposition, the parties' verbal agreement to it, and the court reporter's transcription of it was held to be insufficient for the enforceability of the compromise agreement<sup>190</sup> because the agreement was not stipulated to in open

---

which is not reduced to writing is unenforceable. *Bourgeois v. Franklin*, 389 So.2d 358 (La. 1980); *Jasmin v. Gafney, Inc.*, 357 So.2d 539 (La. 1978). Furthermore, we agree with plaintiff that *the requirement that the agreement be reduced to writing necessarily implies that the agreement be evidenced by documentation signed by both parties*. *Singleton v. Bunge Corp.*, 364 So.2d 1321 (La.App. 4th Cir.1978).

As was stated in *Bourgeois*, supra, "La. C.C. art. 3071 is placed in the code to insure proper proof of extra-judicial agreements. Inasmuch as there is no judgment on the merits outlining the obligations each party has to the other when a case is settled by the parties, the law has seen fit to require the compromise agreement, which sets out those obligations, to be reduced to writing to serve as proof of the agreement and the acquiescence therein." *Obviously, to serve as written proof of the agreement and obligations of both parties, and their acquiescence therein, the written agreement must be signed by both parties, obligating both to do what they have agreed on.*

*Felder*, 405 So.2d at 523 (emphasis added).

This may present another form requirement for the modification, waiver, or extinguishment of the obligation of final spousal support when that agreement constitutes a transaction or compromise. Ordinarily, only an authentic act or act under private signature duly acknowledged by the obligee is required. La. Civ. Code art. 116. Presumably, the obligee need be the only party to the authentic act if that form of contract is used pursuant to Louisiana Civil Code article 1833, and only the obligee of the final spousal support obligation need execute the authentic act. It would not be logical to require that both the obligor and the obligee execute an authentic act, but require that only the obligee need acknowledge an act under private signature. However, if the requirement that a transaction or compromise "must be signed by both parties," *Sullivan*, 671 So. 2d at 317, is applied to a modification, waiver, or extinguishment of the obligation of final spousal support that constitutes a transaction or compromise, this form requirement of transactions or compromises generally constitutes an additional form requirement of Civil Code article 116 in this instance.

188. La. Civ. Code art. 3071.

189. *Kee v. Cuco's, Inc.*, 618 So. 2d 12 (La. App. 3d Cir. 1993).

190. *Sullivan v. Sullivan*, 671 So. 2d 315 (La. 1996). *Lavan* held that a letter by the attorney of one party to the attorney of the other party setting forth his understanding of the compromise agreement did not satisfy the requirement that the agreement be reduced to writing. *Lavan v. Nowell*, 676 So. 2d 1192, 1193 (La. App. 3d Cir. 1996). See *Coleman v. Academy of the Sacred Heart*, 650 So. 2d 265 (La. App. 4th Cir. 1993). However, the compromise agreement need not be contained in one document. *Felder v. Georgia Pac. Corp.*, 405 So. 2d 521 (La. 1981). There may be a written offer in one document and a written acceptance in another document. *Grace v. Zapata Off-Shore Co.*, 653 So. 2d 1995 (La. App. 4th Cir. 1995); *Scott*, 621 So. 2d 1. In *Lavan v. Nowell*, 676 So. 2d 1192 (La. App. 3d Cir.), writ granted and case remanded, 683 So. 2d 255 (1996), on remand, 702 So. 2d 315 (1997), the attorneys for the parties verbally agreed to the settlement of a pending suit arising out of a personal injury claim. Plaintiff's attorney wrote a letter to defendant's attorney confirming the amount of the settlement. The defendant's attorney made no written response. Later, in open court, the letter was introduced into evidence and the defendant's attorney admitted that he had entered into a verbal agreement to settle the case and that the letter had set forth



court, nor was it reduced to writing and signed by the parties or their agents. Nor does an attorney of record for a party have general authority by virtue of the client-attorney mandatory relationship to compromise the client's claim. The authority to do so must be express.<sup>191</sup> It also must at least be in writing.<sup>192</sup> Since Civil Code article 116 requires that a juridical act modifying, waiving, or extinguishing the obligation of final spousal support be either an authentic act or an act under private signature duly acknowledged by the obligee, the client's mandate to the attorney authorizing a compromise of the client's final spousal support right must meet the same form requirements.<sup>193</sup>

Although a compromise agreement generally is not required to be in the form of an authentic act or act under private signature duly acknowledged, but may be an act under private signature,<sup>194</sup> Article 116 does not permit the obligation of final spousal support to be modified, waived, or extinguished by an act under private signature, but imposes a form requirement of an authentic act or act under private signature duly acknowledged by the obligee. Which form requirement must be complied with in a pre-nuptial agreement waiving final spousal support? A transaction or compromise is defined as an agreement by which persons adjust their differences for the purpose of "preventing or putting an end to a lawsuit." A pre-nuptial agreement waiving final spousal support can have as its principal cause the preventing of a lawsuit for final spousal support. If it does, the agreement is a compromise or transaction.

Persons, by contract of transaction or compromise, may settle any differences they may have that are the subject of a lawsuit *or that could result in litigation*.<sup>195</sup> However, a reasonable and bona fide dispute between the parties is an indispensable element of a transaction or compromise.<sup>196</sup> The issue in a

---

the oral agreement. The court held that this constituted compliance with the Civil Code article 3071 requirement that the terms of the agreement be capable of transcription, and that it allowed the agreement to "thereafter be written in a more convenient form."

191. La. Civ. Code art. 2997(5), as amended by 1997 La. Acts No. 261, § 1, effective Jan. 1, 1998, provides, "Authority also must be given expressly to: . . . (5) Enter into a compromise. . . ." See *Bennett v. Great Atlantic & Pac. Tea Co., Inc.*, 665 So. 2d 84 (La. App. 1st Cir. 1995).

192. La. Civ. Code art. 2993, as amended by 1997 La. Acts No. 261, § 1, effective Jan. 1, 1998, provides: "The contract of mandate is not required to be in any particular form. Nevertheless, when the law prescribes a certain form for an act, a mandate authorizing the act must be in that form." Comment (c), Revision Comments - 1997 to La. Civ. Code art. 2993 states:

(c) The law requires that a donation be made by authentic act. C.C. Art. 1536 (1870). Therefore, under Civil Code Article 2993 (Rev.1997), a mandate authorizing the mandatory to make a donation must be by authentic act. Further, the law requires a written act for a compromise. C.C. Art. 3071 (Amended 1981). Therefore, under Civil Code Article 2993 (Rev.1997), a mandate authorizing the mandatory to enter into a compromise agreement must be in writing.

193. La. Civ. Code arts. 2993, 3071.

194. La. Civ. Code art. 3071.

195. *Daigle v. Clemco Indus.*, 613 So. 2d 619 (La. 1993); *Mayeaux v. Danny's Inc.*, 663 So. 2d 822 (La. App. 5th Cir. 1995); *Perault v. Time Ins. Co.*, 633 So. 2d 263 (La. App. 1st Cir. 1993).

196. *Hancock v. Lincoln Am. Life Ins. Co.*, 278 So. 2d 561 (La. App. 1st Cir. 1973), *writ*

pre-nuptial agreement waiving final spousal support will be, whether or not *at the time* the parties had a reasonable and bona fide dispute, whether there should be final spousal support in the event of divorce. Is an act under private signature executed during a contested spousal support proceeding a sufficient compliance with the form requirements of an agreement extinguishing final spousal support to confer the right of judicially enforcing its performance? It is suggested that the following should be the form requirements. Article 116 should govern an agreement confected under circumstances in which the agreement is not a compromise or transaction because there is no competing form requirement. When the agreement is confected under circumstances that constitute a compromise to prevent or put an end to a lawsuit, there are two competing form requirements in Civil Code articles 116 and 3071. The one in Article 116 is more stringent than that in Article 3071. There appears to be no reason why a less-stringent form requirement should apply when the agreement is a compromise than when it is not. Article 3071 regulates the form requirements of compromise agreements generally; in this instance, Article 116 regulates the form requirements of the compromise of a particular type of right or claim. The more stringent form requirements of Article 116 should apply.<sup>197</sup> Therefore, a written compromise agreement modifying, waiving, or extinguishing the obligation of final spousal support should be in the form of an authentic act or act under private signature duly acknowledged by the obligee.

Article 3071 also permits a compromise contract or agreement to be recited in open court in such a manner that it is capable of being transcribed from the record of the proceedings. In this instance, there is no written agreement. Therefore, there is no conflict with the form requirement of Article 116 for a juridical act, and this method of confecting the compromise agreement should be

---

*denied*, 281 So. 2d 754 (1973); *Linda Mercantile Corp. v. Bowers*, 230 So. 2d 302 (La. App. 1st Cir. 1969), *writ denied*, 255 La. 810, 233 So. 2d 250 (1970). The jurisprudence dealing with the issue of whether or not a community property partition agreement is a transaction or compromise, and thus not subject to revocation for lesion, is instructive on the issue of the existence of the requirement for a bona fide dispute between the parties and the nature of that dispute. *Compare* *Harmon v. Harmon*, 508 So. 2d 616 (La. App. 2d Cir. 1987); *Gates v. Gates*, 485 So. 2d 114 (La. App. 2d Cir. 1986); and *Joy v. Joy*, 379 So. 2d 816 (La. App. 1st Cir. 1980) *with* *Dornier v. Live Oak Arabians, Inc.*, 602 So. 2d 743 (La. App. 1st Cir. 1992); and *dela Vergne v. dela Vergne*, 514 So. 2d 186 (La. App. 4th Cir. 1987).

197. *City of Opelousas* held:

The issue on appeal is whether the prescriptive period for the City's claim against the Waterbury property is three years under La.R.S. 33:3746(A) or thirty days under 33:3306(C). According to La.Civ.Code art. 13, "[l]aws on the same subject matter must be interpreted in reference to each other." This article makes it the duty of courts to harmonize and reconcile statutes if possible. *State In Interest of A.C.*, 93-1125 (La.1/27/94), 643 So.2d 719. However, where two statutes deal with the same subject matter and cannot be harmonized, the one which specifically addresses the matter at issue must prevail. *Moolekamp v. Rubin*, 562 So.2d 1134 (La.App. 4 Cir.), *writ denied* 567 So.2d 108 (La.1990).

*City of Opelousas v. Waterbury*, 674 So. 2d 1128, 1133 (La. App. 3d Cir. 1996).

valid.<sup>198</sup> Compliance with it confers on each party to the compromise the right of judicially enforcing its performance.

---

198. This is true if the parties themselves are personally reciting or acknowledging the terms and conditions of the compromise agreement in open court. However, if the attorneys are making the stipulation in open court without the participation of the parties, the mandate to the attorneys from the clients must meet the form requirements of Civil Code article 116.

A good method of handling a stipulation in open court, followed by many attorneys and courts, is reflected in *Soldani v. Schweter*, in which the parties and their attorneys appear in open court, the stipulation is read into the record, the court reporter records the stipulation, and the court interrogates the parties concerning their hearing and understanding of the stipulation, invites any questions, and the parties and attorneys verbally assert to the stipulation. *Soldani v. Schweter*, 701 So. 2d 1023 (La. App. 5th Cir. 1997). The stipulation is later reduced to a consent judgment. This procedure avoids the problem presented in *Hawkins*, in which the attorneys verbally stipulated in open court to reduce an alimony award. *Hawkins v. Hawkins*, 592 So. 2d 843 (La. App. 3d Cir. 1991). Six years later, the former wife contended that she did not agree to the reduction, although she apparently was in the courtroom at the time of the attorneys' stipulation. In upholding the stipulation, the court was forced to rely upon the presumption that her attorney was authorized to make the stipulation on her behalf.

The practitioner should be aware that court reporters are required to preserve their notes (and presumably stenotype tapes and electronic tapes including stenomask tapes, see La. Code Civil P. art. 372(A)) for only a limited period of time. Louisiana Revised Statutes 13:1276 provides that court reporters shall preserve their notes in each cause for the period of one year from the date of submission thereof. Louisiana Code of Civil Procedure article 372(C) provides that the court reporter shall retain all notes and tape recordings in civil cases for a period of not less than five years after the end of the trial. Additionally, special statutes govern the length of time a court reporter in a particular judicial district must retain his notes. See, e.g., La. R.S. 13:967(F), La. R.S. 13:969(K), and La. R.S. 13:980(E) (1983). If a stipulation is a compromise in which final spousal support is modified, waived or extinguished, and the stipulation is not reduced to a consent judgment, after the expiration of the period during which the court reporter of that court must retain his notes, the stipulation may no longer be "capable of being transcribed from the record of the proceeding," and the compromise would be judicially unenforceable because of a defect in form. La. Civ. Code art. 3071. Therefore, even if a consent judgment will not be entered upon the stipulations, the stipulations should be transcribed by the court reporter and filed in the record. It is the responsibility of the party relying upon them to see that the court reporter's notes are transcribed. *Schaumburg v. Grishman*, 168 La. 251, 121 So. 2d 760 (La. 1929). However, having the stipulation transcribed will not meet the form requirements of Civil Code article 116 for the modification, waiver, or extinguishment of the obligation of final spousal support. The transcribed stipulation will not qualify as an authentic act or act under private signature duly acknowledged by the obligee. If, however, the stipulation is reduced to a consent judgment, the form requirements of Civil Code article 116 are complied with.

A stipulation by the parties themselves in open court, not reduced to judgment, which modifies, waives, or extinguishes the obligation of final spousal support, whether or not the agreement constitutes a compromise or transaction, should be held to be valid as a judicial confession. A judicial confession is defined by Louisiana Civil Code article 1853:

A judicial confession is a declaration made by a party in a judicial proceeding. That confession constitutes full proof against the party who made it.

A judicial confession is indivisible and it may be revoked only on the ground of error of fact.

Even though an oral stipulation in open court would not comply with the form requirements of Civil Code article 116, it would be a judicial confession. To constitute a judicial confession, the declaration of a party made in a judicial proceeding need not be a compromise or transaction. A

A juridical act modifying, waiving, or extinguishing the obligation of final spousal support is not a matrimonial agreement.<sup>199</sup> A matrimonial agreement has its own form requirements,<sup>200</sup> a requirement of judicial approval if entered into during marriage,<sup>201</sup> and a recordation requirement.<sup>202</sup> All agreements

---

judicial confession made in a consent proceeding, even though based upon an erroneous legal conclusion, is binding upon the party making it. See *Succession of Williams*, 418 So. 2d 1317 (La. 1982). In *Succession of Williams*, the judicial confession was made in a joint petition for possession. There was at the time no dispute between the parties.

If there is any conflict between the form requirements of Civil Code article 1853 and Article 116, the former should prevail. There is a strong public policy supporting the integrity of judicial proceedings, and a judicial confession made by a party in pleadings or in a written stipulation filed in the court record or an oral stipulation made in open court should be binding on the party making the judicial confession, whether or not it complies with the form requirements of another Civil Code article.

There is a difference in the effect of a judicial admission, depending upon whether it was made in the same suit or a previous suit. If made in the same suit, it has conclusive effect in that suit. If made in a previous suit, it does not bind the party who made it in subsequent litigation, unless the adverse party has been prejudiced by his reliance upon the admission.

The allegation contained in the earlier worker's compensation suit is not a judicial admission, with its conclusive effect, in the present proceeding. See La. Civ. Code art. 1853. The Louisiana jurisprudence is clear that such an "extra-judicial" confession does not bind the claimant in subsequent litigation. Saul Litvinoff, *The Law of Obligations* 426, in 5 Louisiana Civil Law Treatise (1992); *Succession of Turner*, 235 La. 206, 103 So. 2d 91 (1958), and authorities cited therein. The party who has made such an admission in a previous suit is not barred from denying the facts contained in that admission in a subsequent suit, unless the adverse party has been prejudiced by his reliance upon that admission. *Id.* Rather, the admission is to be given the probative value it deserves as an admission of the party who made it. See La. Code Evid. art. 801(D)(3); *Farley v. Frost-Johnson Lumber Co.*, 133 La. 497, 63 So. 122 (1913); George Pugh, *Admissions and Confessions, in The Work of the Louisiana Supreme Court for the 1957-1958 Term-Evidence*, 19 La. L. Rev. 294, 434 (1959). There being no evidence that the defendant was prejudiced by this admission in a suit to which the defendant was not even a party, it is perfectly allowable for the plaintiff to now change his position in regards to that earlier assertion. *Alexis v. Metropolitan Life Insurance Company*, 604 So. 2d 581, 581-82 (La. 1992). However, the practitioner can avoid all of these potential problems with reference to the form of a modification, waiver, or extinguishment of the obligation of final spousal support by careful attention to, and compliance with, these form requirements.

199. Civil Code article 2328 defines a matrimonial agreement: "A matrimonial agreement is a contract establishing a regime of separation of property or modifying or terminating a legal regime." This definition is too narrow. An agreement terminating a separation of property regime and establishing a contractual regime, or substituting any regime for another type of regime, Civil Code article 2326, or modifying any type of regime, is a matrimonial agreement. See *infra* discussion.

200. Civil Code article 2331 provides that a matrimonial agreement may be made by an act under private signature "duly acknowledged by the spouses." (emphasis added). In contrast, Civil Code article 116 provides that the obligation of final spousal support may be modified, waived, or extinguished by an act under private signature "duly acknowledged by the obligee." (emphasis added).

201. Civil Code article 2329 provides that, with the two exceptions noted, spouses may enter into a matrimonial agreement that modifies or terminates a matrimonial regime during marriage only upon joint petition and a finding by the court that this serves their best interests and that they understand the governing principles and rules.

202. Civil Code article 2332 provides that a matrimonial agreement is effective toward third persons when the recordation requirements of that article are met.

entered into between married persons are not matrimonial agreements. The latter are a particular type of agreement, defined by the subject matter of the agreement.

The basic characteristic that distinguishes a matrimonial agreement from other types of contracts entered into between spouses or between persons contemplating marriage is that a matrimonial agreement contracts with reference to the property *regime* that exists or will exist between them during the marriage.<sup>203</sup> A property *regime* is a system of principles and rules that govern the ownership and management of the property of spouses during marriage, both as between themselves and towards third persons.<sup>204</sup>

The object of a matrimonial agreement is these governing principles and rules.<sup>205</sup> If the agreement modifies any of the principles or rules of a particular regime, or one system of principles or rules is substituted for another (one regime for another) in whole or in part, the agreement is a matrimonial agreement. Spouses are at liberty, however, to enter into a myriad of other contracts or agreements between themselves before or during marriage which are not matrimonial agreements.<sup>206</sup> For convenience, those agreements between spouses that are not matrimonial agreements have been denominated as "interspousal contracts."<sup>207</sup> These types of contracts between spouses have no special form, court approval, or recordation requirements, as do matrimonial agreements. They are subject only to the general rules governing the proof of obligations and the special rules regulating the proof of some particular types of obligations.<sup>208</sup> There is no requirement for court approval if entered into

---

203. Other writers have suggested that the distinction between a matrimonial agreement and an interspousal contract is whether the agreement deals with present or future property. Katherine S. Spaht & W. Lee Hargrave, *Matrimonial Regimes*, in 16 Louisiana Civil Law Treatise §§ 8.6, 8.12 (2d ed. 1997).

204. La. Civ. Code art. 2325.

205. Civil Code articles 1971-1977 regulate the object of contracts. See *A Better Place, Inc. v. Giami Inv. Co.*, 445 So. 2d 728 (La. 1984).

206. With the repeal of former Civil Code article 1790, which generally prohibited spouses from contracting with each other, by 1979 La. Acts No. 711, § 1, spouses can now contract with each other at least to the same extent as persons who are not married to each other. These contracts include sales, donations, compromises of disputes, employment contracts, leases, and any other contracts that any other two consenting adults having contractual capacity are permitted to enter into, with the exceptions specified in the law or which are prohibited by public policy. La. Civ. Code arts. 7, 2330. See generally Spaht & Hargrave, *supra* note 203.

207. Noel Joseph Darce, *Interspousal Contracts*, 42 La. L. Rev. 727 (1982); Spaht & Hargrave, *supra* note 203, § 812, at 552.

208. For example, an inter vivos trust (La. R.S. 9:1752 (1991)), a transfer of immovable property (La. Civ. Code arts. 1839 and 2440), a conventional mortgage (La. Civ. Code art. 3287), a contract of mandate (La. Civ. Code arts. 2989-3032), a donation of life insurance (La. R.S. 22:1521 (1995)), and donations of immovables, movables, corporeals, and incorporeals (La. Civ. Code arts. 1536-1539) have their own form requirements. There are many more form requirements for other contracts, differing because of the classification of the object of the contract or the nature of the contract.

during the marriage. Nor are there any special recordation requirements for interspousal contracts, as there are for matrimonial agreements.<sup>209</sup>

A number of cases have incorrectly classified an interspousal agreement as a matrimonial agreement and imposed the form requirement and other requirements of the latter to invalidate the agreement. Two of these cases involve support agreements.

In *Holland v. Holland*,<sup>210</sup> the husband contended that he and his wife had an agreement (which apparently was verbal) that during their marriage he would support her while she was in medical school and then she would support him while he pursued his education. The wife left him shortly before her graduation from medical school. Mr. Holland sought to enforce the agreement. The court erroneously applied the form requirements of a matrimonial agreement to this support agreement in rejecting the husband's claim. The agreement was not a matrimonial agreement, because it did not affect the matrimonial regime existing between the parties, but was an interspousal agreement, to which the form requirements of Civil Code article 2331 are not applicable.

In *Washington v. Washington*,<sup>211</sup> the spouses executed an act under private signature containing provisions obligating the husband to support the wife's two children (who were not his children). Although correctly defining a matrimonial agreement, the court erroneously found "the marital contract void for failure of the parties to comply with the form requirements of Article 2331."

#### G. Article 117

##### *Art. 117. Peremptive period for obligation*

*The right to claim after divorce the obligation of spousal support is subject to a peremption of three years. Peremption begins to run from the latest of the following events:*

- (1) The day the judgment of divorce is signed.*
- (2) The day a judgment terminating a previous judgment of spousal support is signed, if the previous judgment was signed in an action commenced either before the signing of the judgment of divorce or within three years thereafter.*
- (3) The day of the last payment made, when the spousal support obligation is initially performed by voluntary payment within the periods described in Paragraph (1) or (2) and no more than three years has elapsed between payments.*

---

209. There are recordation requirements for certain types of contracts in order to affect third persons. See La. Civ. Code art. 2332 pertaining to matrimonial agreements.

210. 539 So. 2d 1011 (La. App. 4th Cir. 1989).

211. 471 So. 2d 925 (La. App. 2d Cir. 1985).

The Law Institute proposed that the obligation of spousal support be subject to a peremptive period of five years.<sup>212</sup> The legislature reduced that period to three years. The peremptive period applies to both an interim periodic allowance and final periodic support that has not been reduced to judgment. Previously, a spousal support obligation not reduced to judgment was not subject to a prescriptive or peremptive period.<sup>213</sup> On the other hand, an action to make executory arrearages of spousal support was and continues to be subject to a liberative prescription of five years.<sup>214</sup> A peremptive period, unlike a prescriptive period, is not subject to interruption or suspension.<sup>215</sup> Prescription may be renounced only after it has accrued; peremption may not be renounced at any time.<sup>216</sup> Generally, this peremptive period commences with the signing of the judgment of divorce.<sup>217</sup> This clearly-determinable commencement date for the peremptive period avoids the statutory construction problem inherent in the rendition of the judgment of divorce being the commencement date of the one hundred-eighty-day maximum period for interim periodic support after a divorce.<sup>218</sup> The commencement of the peremptive period is not suspended by reason of an appeal of the divorce judgment. Although an appeal from a judgment granting a divorce suspends the execution of the judgment insofar as it relates to the divorce and some other matters,<sup>219</sup> the three-year peremptive

---

212. See *supra* note 44 for the text of proposed Civil Code article 117.

213. Comment (a), Revision Comments - 1997 to La. Civ. Code art. 117 states, in part: Prior to the effective date of this revision, the obligation to support a former spouse not reduced to judgment was not subject to either a prescriptive or peremptive period. On the other hand, the right to obtain a judgment for *arrears* of support has been, and continues to be, subject to a five year prescriptive period. C.C. Art. 3497.1 (added by Acts 1984, No. 147).

214. La. Civ. Code art. 3497.1, as amended by 1997 La. Acts No. 605.

215. Civil Code article 3461 provides that peremption may not be renounced, interrupted, or suspended. On the other hand, prescription may be suspended or interrupted. When the running of prescription is suspended, the period of suspension is not counted toward accrual of prescription, and prescription commences to run again upon the termination of the period of suspension. La. Civ. Code art. 3472. See *Stamp v. Dr. I. C. A. Okpalobi*, 599 So. 2d 896 (La. App. 4th Cir. 1992) for the calculation of a prescriptive period in a medical malpractice claim, which is subject to a period of suspension when a request for a review by a medical review panel is filed. When the running of prescription is interrupted, the time that has run is not counted toward the accrual of prescription, and prescription commences to run anew from the last day of interruption. La. Civ. Code art. 3466. Comment (b), Revision Comments - 1982 to La. Civ. Code art. 3466. See *Garrity v. Cazayoux*, 430 So. 2d 1138 (La. App. 1st Cir. 1983).

A juridical act purporting to exclude prescription, to specify a longer period than that established by law, or to make the requirements of prescription more onerous, is null. La. Civ. Code art. 3471. Prescription may be renounced only after it has accrued. La. Civ. Code art. 3449.

216. La. Civ. Code art. 3449.

217. Civil Code article 117 provides that the peremptive period commences with the occurrence of the last of three enumerated events, the *first* of which is: "(1) The day the judgment of divorce is signed."

218. La. Civ. Code art. 113. See *supra* note 92 for discussion in text.

219. La. Code Civ. P. art. 3942 provides:

period, to which the obligation of spousal support is subject, commences with the signing of the divorce judgment and continues during the trial court application for rehearing or new trial proceedings, and during the appeal. The relatively short peremptive period may present some problems for the fault-free claimant spouse. That spouse may not need spousal support during the divorce proceedings and at the time the judgment of divorce is signed, or the obligor spouse may not have the income or other means to supply spousal support during that period. If either of these conditions changes at a time subsequent to the relatively short peremptive period of three years commencing with the signing of the divorce judgment, the claimant spouse will have no right to spousal support. Unlike liberative prescription, which merely bars the remedy sought to be enforced and terminates the right of access to the courts for the enforcement of a right which still exists, peremption destroys the right itself and the cause of action, or substantive right, no longer exists.<sup>220</sup> The five-year peremptive period recommended by the Law Institute provided a longer post-divorce adjustment period before terminating all spousal support rights and obligations unless they had been reduced to judgment or acknowledged by voluntary payments.

Louisiana procedural law does not expressly provide a method of pleading peremption. The effect of the running of the peremptive period has been described as "destroy[ing] the cause of action itself. That is to say, after the limit of time expires the cause of action no longer exists; it is lost."<sup>221</sup> It has been suggested that the proper procedural device to raise the defense of peremption is an exception of no cause of action.<sup>222</sup> One court amended, on its own motion, an exception of prescription to an exception of peremption,

---

A. An appeal from a judgment granting or refusing an annulment of marriage or a divorce can be taken only within thirty days from the applicable date provided in Article 2087(A)(1)-(3).

B. Such an appeal shall suspend the execution of the judgment insofar as the judgment relates to the annulment, divorce, or any partition of community property or settlement of claims arising from the matrimonial regime.

220. La. Civ. Code art. 3458 provides, "Peremption is a period of time fixed by law for the existence of a right. Unless timely exercised, the right is extinguished upon the expiration of the peremptive period." Comment (b), Revision Comments - 1982 to La. Civ. Code art. 3458 states, in part:

(b) Peremption is a period of time, fixed by law, within which a right must be exercised or be forever lost. *Guillory v. Avoyelles Ry. Co.*, 104 La. 11, 28 So. 899 (1900). Liberative prescription merely prevents the enforcement of a right by action; in contrast, peremption destroys the right itself. See *Pounds v. Schori*, 377 So.2d 1195 (La.1979); *Flowers Inc. v. Rausch*, 364 So.2d 928 (La.1978).

221. *Guillory v. Avoyelles Ry. Co.*, 104 La. 11, 15, 28 So. 899, 901 (La. 1900). See also *Flowers, Inc. v. Rausch*, 364 So. 2d 928 (La. 1978); *Pounds v. Schori*, 377 So. 2d 1195 (La. 1979).

222. *Davis v. Sewerage and Water Bd.*, 469 So. 2d 1144 (La. App. 4th Cir. 1985); *James F. Shuey, Legal Rights and the Passage of Time*, 41 La. L. Rev. 220, 238 (1980). *Davis* correctly held that the court could raise or notice on its own motion the failure to disclose a cause of action. La. Code Civ. P. art. 927(B).



which it then sustained.<sup>223</sup> Another method of asserting the defense of peremption is by the way of a motion for summary judgment.<sup>224</sup> A motion for summary judgment may be based on a plea of prescription.<sup>225</sup> The same is true of a defense based upon peremption. A motion for summary judgment may be a useful method of raising a defense of peremption when the facts supporting it do not appear of record.<sup>226</sup>

The Louisiana Supreme Court recently addressed the issue of whether a particular time limit for the judicial exercise of a right is a period of prescription or a period of peremption. In *State of Louisiana Through the Division of Administration v. McInnis Brothers Construction*,<sup>227</sup> the issue was whether the time limitation provided in Louisiana Revised Statutes 38:2189 for the filing by the State of a suit against a general contractor and a surety on a public works contract is peremptive or prescriptive. After reviewing the accepted distinctions between prescription and peremption,<sup>228</sup> the court noted that Civil Code articles

---

223. *State in re Taylor*, 637 So. 2d 512 (La. App. 1st Cir. 1993). An exception of peremption is not listed in Louisiana Code of Civil Procedure article 927 as one of the peremptory exceptions. However, this article provides that the objections that may be raised through the peremptory exception "include but are not limited to" the listed exceptions. The Editor's Notes to this article state, "The list is illustrative, not restricted." This Note is supported by the text of the article. Therefore, a peremptory exception of peremption appears to be an appropriate method of raising this defense. Although Article 927 does not grant authority to the court to notice on its own motion an objection of peremption, Civil Code article 3460 does. That article provides that peremption may be pleaded or it may be supplied by a court on its own motion at any time prior to final judgment. A court is expressly prohibited from supplying the objection of prescription. La. Civ. Code art. 3452; La. Code Civ. P. art. 927. On the other hand, a court may notice or raise on its own motion the failure to disclose a cause of action. A disadvantage in raising this defense by means of a peremptory exception of no cause of action is that frequently the factual basis for the defense of peremption does not appear in the petition or other pleadings being objected to. If this defense is treated as being a failure to disclose a cause of action, or no cause of action, this peremptory exception is triable "on the face of the petition," and no evidence may be introduced to support the exception. *Williams v. Gallinano*, 697 So. 2d 294 (La. App. 1st Cir. 1997).

It is difficult sometimes to determine if the legislature has created a prescriptive period or a peremptive period. See *Preferred Inv. Corp. v. Neucore*, 592 So. 2d 889 (La. App. 4th Cir. 1991); *Dowell v. Hollingsworth*, 649 So. 2d 65 (La. App. 1st Cir. 1994). However, Louisiana Civil Code article 117 expressly provides that the right to claim after divorce the obligation of spousal support is subject to a peremption of three years. See *infra* discussion in text accompanying note 227 of the case of *State of Louisiana Through the Division of Administration v. McInnis Bros. Constr.* for the weight to be given to legislative classification of a period as prescriptive or peremptive.

224. La. Code Civ. P. art. 966.

225. *Duhon v. Boustany*, 239 So. 2d 180, 181 (La. App. 3d Cir. 1970); *Scott v. Butler Bros. Furniture Co. of Baker*, 315 So. 2d 809, 810 (La. App. 1st Cir. 1975); *Gilbert v. Pearson*, 478 So. 2d 937, 940 (La. App. 3d Cir. 1985).

226. Evidence supporting and controverting an exception of prescription is admissible. La. Code Civ. P. art. 931; *Our Lady of the Lake Hosp. v. Vanner*, 669 So. 2d 463, 464 (La. App. 1st Cir. 1995). The same should be true of an exception of peremption.

227. 701 So. 2d 937 (La. 1997).

228. The *McInnis* court stated:

3458-61<sup>229</sup> give "no guidance on how to determine whether a particular time limit is prescriptive or preemptive."<sup>230</sup> The court noted that the jurisprudence had held "that a statute is preemptive where it both creates the right of action and stipulates the time within which that right may be executed,"<sup>231</sup> although that was not the sole test of preemption as distinguished from prescription.<sup>232</sup> Commencing with *Pounds v. Schori*,<sup>233</sup> the analytical focus shifted from this test to one of the legislative intent and public policy behind the statute in

---

A person's right to assert a cause of action may be lost with the passage of time by the operation of either prescription or preemption. The Louisiana Civil Code defines preemption as a "period of time fixed by law for the existence of a right." La. Civ. Code art. 3458. When the preemptive period has run, the cause of action itself is extinguished unless timely exercised. As a result, the preemption need not be pleaded and may be supplied by a court at any time. La. Civ. Code art. 3460. Most significantly, however, preemption may not be renounced, interrupted, or suspended. La. Civ. Code art. 3461. In contrast, liberative prescription is a period of time fixed by law for the exercise of a right. Article 3447 of the Civil Code defines liberative prescription as a "mode of barring of actions as a result of inaction for a period of time." Thus, while preemption destroys the right itself, prescription merely prevents the enforcement of a right such that a natural obligation remains after prescription has run. Consequently, prescription must be specially pleaded and cannot be supplied by the court, La. Civ. Code art. 3452 and La. Code Civ. P. art. 927. Additionally, prescription may be renounced, La. Civ. Code arts. 3449-3451, interrupted, La. Civ. Code arts. 3462-3466, and suspended, La. Civ. Code arts. 3467-3472.

*McInnis*, 701 So. 2d at 939.

229. These articles, enacted by 1982 La. Acts No. 187, § 1, effective Jan. 1, 1983, codified "the previously existing jurisprudentially-created doctrine of preemption." *McInnis*, 701 So. 2d at 940. The articles provide:

Art. 3458. Preemption; effect

Preemption is a period of time fixed by law for the existence of a right. Unless timely exercised, the right is extinguished upon the expiration of the preemptive period.

Art. 3459. Application of rules of prescription

The provision on prescription governing computation of time apply to preemption.

Art. 3460. Preemption need not be pleaded

Preemption may be pleaded or it may be supplied by a court on its own motion at any time prior to final judgment.

Art. 3461. Renunciation, interruption, or suspension ineffective

Preemption may not be renounced, interrupted, or suspended.

230. The court stated: "Although the Civil Code now recognizes in Articles 3458-61 the previously existing jurisprudentially-created doctrine of preemption, the Code gives no guidance on how to determine whether a particular time limitation is prescriptive or preemptive." *McInnis*, 701 So. 2d at 940.

231. *Id.* at 941.

232. The court stated:

Although we have not hesitated to find any statute which both creates or grants a right of action and provides for the time period in which to bring that action to be preemptive, we have also noted that this characteristic need not necessarily be present for us to conclude a statute is preemptive in character.

*McInnis*, 701 So. 2d at 941.

233. 337 So. 2d 1195 (La. 1979).

question.<sup>234</sup> The court held that the legislative use of the word "prescription" or "peremption" is not determinative of whether the period is prescriptive or peremptive.<sup>235</sup>

The decision in *McInnis* directly impacts Civil Code article 117. Louisiana Acts 1997, No. 1078 both creates the right to interim periodic support and to final periodic support,<sup>236</sup> and stipulates the time in which those rights must be judicially exercised.<sup>237</sup> Article 117 uses the words "peremptive period" in its title or heading,<sup>238</sup> and the word "peremption" in the text of the article. The

---

234. The *McInnis* court wrote:

In *Pounds v. Schori*, 377 So.2d 1195 (La.1979), this court moved its analytical focus away from the *Guillory* test, and, although the statute at issue in *Pounds* certainly met that test, instead began to focus on the legislative intent and public policy behind the statute.

*McInnis*, 701 So. 2d at 941.

235. The court said:

The role that the actual language used in a statute plays in our analysis is not quite so consistent or clear as our treatment of the foregoing characteristics. In *Pizzillo*, *supra*, we found the statute at issue peremptive even though the statute described the claim as one which would "prescribe" after a certain lapse of time. "While it is true that the Legislature, in providing the time within which suits may be brought, labeled the period as one of prescription, this was inaccurate for, actually, the time provided for the filing of suits was not a period of prescription, but one of peremption." *Pizzillo*, 65 So.2d at 786. Likewise, in *Hebert*, *supra*, wherein we held that La. R.S. 9:5628 was a prescription statute, "with only the single qualification that the discovery rule is expressly made inapplicable after three years from the act, omission or neglect," we rejected defendant's argument that La. R.S. 9:5628 was a peremptive statute, despite the use of strong language in the statute indicating finality, because "not one case in the jurisprudence considering the distinction between prescription and peremption has accentuated the language used in a given statute as determinative of which was intended." *Hebert*, 486 So.2d 724.

*McInnis*, 701 So. 2d at 942.

*McInnis* noted that the statute in question uses the term "prescription" in its body and title, and stated the weight to be given to the use of these terms by the legislature:

We note that although La. R.S. 38:2189 uses the term "prescription" in its body and title, we have explained, *supra*, that while some weight should be given to the use of these terms in a statute, it is the legislative purpose sought to be achieved by a particular limitation which is the most significant and determinative factor in distinguishing a peremptive statute from a prescriptive one.

*Id.* at 946 n.8. The court held the period to be peremptive, not prescriptive.

236. La. Civ. Code arts. 111, 113.

237. La. Civ. Code art. 117.

238. Although the title to a statute is not a part of the statute, the title or preamble may be considered in determining legislative intent where doubt exists as to that intent. *Matter of American Waste and Pollution Control Co.*, 642 So. 2d 1258 (La. 1994); *Louisiana Associated Gen. Contr. v. Calcasieu*, 586 So. 2d 1354 (La. 1991); *Green v. Louisiana Underwriters Ins. Co.*, 571 So. 2d 610 (La. 1990); *Conley v. City of Shreveport*, 216 La. 78, 43 So. 2d 223 (La. 1949); *Thompson v. Department of City Civil Serv.*, 214 La. 683, 38 So. 2d 385 (La. 1949); *State ex rel. Schimpf v. Thomas*, 204 La. 541, 15 So. 2d 880 (La. 1943).

1997 La. Acts No. 1078, § 7, effective Jan. 1, 1998, provides: "The headings, source lines, and comments in this Act are not part of the law and are not enacted into law by virtue of their inclusion in this Act."

Revision Comments - 1997 to Civil Code article 117 repeatedly refer to the period as a preemptive period.<sup>239</sup> It may be argued that since the heading of Article 117 describes the period as preemptive, the comments accompanying the Law Institute's proposed Article 117 clearly described the period as one of preemption, as the article itself denominates it to be, and the legislature adopted the article as proposed except for reducing the period from five years to three years; this reflects the legislative intent that the period be one of preemption, not prescription. The "purpose sought to be achieved by the particular limitation period involved"<sup>240</sup> in Article 117 is not readily apparent from the Act. The purpose may have been to extinguish forever the right to spousal support at the end of a three-year period commencing with the signing of the divorce judgment, unless that right has been exercised in the manner provided within that three-year period. This consideration, as well as the legislature's action in adopting a number of amendments to the bill as it was introduced upon recommendation of the Law Institute, which limited, restricted, or reduced the right to spousal support, may reflect the legislative intent that the Article 117 period be one of preemption and not of prescription.

Although preemption may not be interrupted or suspended,<sup>241</sup> the commencement of an action for spousal support or the service of process as provided by Louisiana Civil Code article 3462 is the exercise of the right subject to preemption, and as long as the action is pending, the lapse of the period of preemption does not extinguish the right.<sup>242</sup>

Preemption begins to run from the *latest* of three events. The first is the signing of the judgment of divorce.<sup>243</sup> Although the signing of the judgment of divorce will most often commence the preemptive period, two other events may commence that period. If a judgment of spousal support is signed in an action commenced either before the signing of the judgment of divorce or within three years thereafter, and a subsequent judgment in that action terminates the

---

239. The Comments are not part of 1997 La. Acts No. 1078. *Id.* See also *Ramirez v. Fair Grounds Corp.*, 575 So. 2d 811 (La. 1991).

240. The court stated, "We agree that each case of this nature should be considered separately on its merits, bearing in mind that the main consideration is the purpose sought to be achieved by the particular limitation period involved." *Louisiana v. McInnis Bros. Constr.*, 701 So. 2d 937, 941 (La. 1997) (quoting *Pounds v. Schori*, 377 So. 2d 1195, 1199-1200 (La. 1979)).

241. Louisiana Civil Code article 3461 provides: "Preemption may not be renounced, interrupted, or suspended."

242. Comment (c), Revision Comments - 1982 to La. Civ. Code art. 3461. Comment (b), Revision Comments - 1997 to La. Civ. Code art. 117, states:

(b) A preemptive period, unlike a prescriptive period, is not subject to interruption or suspension, nor may it be renounced. C.C. Art. 3461 (rev. 1982).

The right to enforce the obligation provided in this Chapter is timely exercised when an action asserting the right is filed before the expiration of the preemptive period. See Comment (c) to C.C. Art. 3461 (rev. 1982). For other effects of a preemptive period, see C.C. Arts. 3458-3460 (rev. 1982).

See also Comment (e), Revision Comments - 1982 to La. Civ. Code art. 3461.

243. La. Civ. Code art. 117(1).

previous judgment of support, the peremptive period commences on the day the latter judgment, terminating the spousal support, is signed.<sup>244</sup> Also, if a spouse has been making voluntary payments within the three-year period after a judgment of divorce is signed (event No. 1) or within three years of a judgment terminating his previously-ordered spousal support payments (event No. 2), the peremptive period commences on the date that the last voluntary payment is made, provided that no more than three years has elapsed between the voluntary payments.<sup>245</sup> The voluntary payments must be made in recognition of the obligation of spousal support and not for some other reason, such as a spirit of liberality.<sup>246</sup> Additionally, the voluntary payment must not be pursuant to a contract between the parties, as the payment would not then be considered voluntary but in satisfaction of an obligation. In that case, the conventional obligation of spousal support is subject to the general prescriptive period of ten years, not the peremptive period of three years.<sup>247</sup>

## V. REVISED STATUTES REVISIONS

### A. Revised Statutes 9:321

#### *§ 321. Retroactivity of judgment concerning spousal support*

*A. Except for good cause shown, a judgment awarding, modifying, or revoking an interim spousal support allowance shall be retroactive to the date of judicial demand.*

*B. (1) A judgment that initially awards or denies final spousal support is effective as of the date the judgment is rendered and terminates an interim spousal support allowance as of that date.*

---

244. Louisiana Civil Code article 117 provides that the peremptive period commences with the occurrence of the last of three enumerated events, the *second* of which is, "(2) The day a judgment terminating a previous judgment of spousal support is signed, if the previous judgment was signed in an action commenced either before the signing of the judgment of divorce or within three years thereafter."

245. Civil Code article 117 provides that the peremptive period commences with the occurrence of the last of three enumerated events, the *third* of which is, "(3) The day of the last payment made, when the spousal support obligation is initially performed by voluntary payment within the periods described in Paragraph (1) or (2) and no more than three years has elapsed between payments."

246. Comment (c), Revision Comments - 1997 to La. Civ. Code art. 117 states, in part, "The payment to which this Article refers is one that constitutes a recognition of the obligation of spousal support, not merely a gift from the obligor proceeding from a spirit of liberality."

247. Comment (c), Revision Comments - 1997 to La. Civ. Code art. 117 states, in part: The voluntary payment contemplated by this Article is likewise *not* one made pursuant to a contract between the parties, but instead is made by unilateral action of the obligor. If there is a contract between the obligor and the obligee as to payments to be made in satisfaction of the obligation of support, the right to enforce the *conventional* obligation is subject to the general prescriptive period of ten years. See C.C. Art. 3499 (rev. 1983). The contract between the obligor and the obligee may result from consent explicitly or tacitly given by the parties. See C.C. Art. 1927 (rev. 1984).

(2) *If an interim spousal support allowance award is not in effect on the date of the judgment awarding final spousal support, the judgment shall be retroactive to the date of judicial demand, except for good cause shown.*

*C. Except for good cause shown, a judgment modifying or revoking a final spousal support judgment shall be retroactive to the date of judicial demand.*

*D. Spousal support of any kind, except that paid pursuant to an interim allowance award, provided by the debtor from the date of judicial demand to the date the support judgment is rendered, to or on behalf of the spouse for whom support is ordered, shall be credited to the debtor against the amount of the judgment.*

*E. In the event that the court finds good cause for not making the award retroactive to the date of judicial demand, the court may fix the date on which the award shall commence.*

*F. A judgment extinguishing an obligation of spousal support owed to a person who has cohabited with another person of either sex in the manner of married persons shall be retroactive to the date of judicial demand.*

This section contains detailed rules regulating the effective date of a judgment awarding, modifying, revoking or denying an interim spousal support allowance and final spousal support.<sup>248</sup> Generally, a judgment awarding, modifying, or revoking an interim spousal support allowance is retroactive to the date of judicial demand.<sup>249</sup> A judgment which initially awards or denies final spousal support is effective as of the date the judgment is rendered if an interim spousal support allowance is in effect on that date.<sup>250</sup> If so, the judgment

---

248. This new Section is based, in part, on Louisiana Revised Statutes 9:310, as amended by 1993 La. Acts No. 261, § 4, effective Jan. 1, 1994, which provides:

§ 310. Retroactivity of spousal support order

A. An order for spousal support shall be retroactive to the filing date of the petition for spousal support granted in the order.

B. Any support of any kind provided by the judgment debtor from the date the petition for support is filed to the date the support order is issued, to or on behalf of the person for whom support is ordered, shall be credited to the judgment debtor against the amount of the judgment.

C. In the event the court finds good cause for not making the award retroactive, the court may fix the date such award shall become due.

It does not appear that Louisiana Revised Statutes 9:310 was repealed. However, it does not appear that Louisiana Revised Statutes 9:321 is inconsistent with Louisiana Revised Statutes 9:310, but supplants it. See *State v. Piazza*, 596 So. 2d 817, 819-20 (La. 1992); *Thomas v. Highlands Ins. Co.*, 617 So. 2d 877, 878-79 (La. 1993), and *State v. Craig*, 637 So. 2d 437, 443 (La. 1994), for the interpretive rules that repeals-by-implication are not favored and will not be indulged in if there is any reasonable construction that will reconcile two statutes.

249. La. R.S. 9:321(A) (Supp. 1998).

250. La. R.S. 9:321(B)(1) (Supp. 1998).

awarding or denying final spousal support terminates the interim allowance as of the date of the judgment.<sup>251</sup> If an interim spousal support allowance is not in effect on the date of the judgment awarding final spousal support, that judgment is retroactive to the date of judicial demand.<sup>252</sup> A judgment modifying or revoking a final spousal support judgment is retroactive to the date of judicial demand.<sup>253</sup>

In those instances in which the judgment is retroactive to the date of judicial demand, the court may, for good cause shown, decline to make it retroactive to the date of judicial demand.<sup>254</sup> When that occurs, the court may fix the date on which the award shall commence.<sup>255</sup> Except for support paid pursuant to an interim allowance award, spousal support of any kind provided by the debtor from the date of judicial demand to the date the support judgment is rendered, to or on behalf of the spouse for whom support is ordered, must be credited to the debtor against the amount of the judgment.<sup>256</sup>

As previously noted, a judgment extinguishing an obligation of spousal support owed to a person who has cohabited with another person of either sex in the manner of married persons is retroactive to the date of judicial demand.<sup>257</sup>

*B. Revised Statutes 9:386*

*§ 386. Actions pending on effective date of spousal revision act; law governing*

*Acts 1997, No. 1078 does not apply to actions for separation from bed and board or divorce or actions for incidental relief commenced before January 1, 1998, or to reconventional demands thereto, whenever filed. Such actions are to be governed by the law in effect prior to January 1, 1998.*

This section provides that the Act does not apply to actions for separation from bed and board or divorce, or actions for incidental relief commenced before January 1, 1998, or to reconventional demands thereto, whenever filed. These actions are governed by the law in effect prior to January 1, 1998.

It is important to note that the article refers to "actions," not "suits." The word "action" has a well-defined meaning.<sup>258</sup> A civil action is a demand for

---

251. La. R.S. 9:321(B)(1) (Supp. 1998).

252. La. R.S. 9:321(B)(2) (Supp. 1998).

253. La. R.S. 9:321(C) (Supp. 1998).

254. La. R.S. 9:321(A), (B)(2), (C) (Supp. 1998).

255. La. R.S. 9:321(E) (Supp. 1998).

256. La. R.S. 9:321(D) (Supp. 1998).

257. La. R.S. 9:321(F) (Supp. 1998). *See supra* note 145.

258. *See* Rigby and Spaht, *supra* note 11, at 89-90 n.283.

the enforcement of a legal right.<sup>259</sup> An action is commenced by the filing of a pleading presenting the demand to a court of competent jurisdiction.<sup>260</sup> Many actions may be cumulated with an action for separation from bed and board or for divorce, including actions for spousal support, child support, custody, and others.<sup>261</sup> Spousal support is an incidental matter.<sup>262</sup> The applicability of this Act depends upon whether one of the enumerated actions was commenced before January 1, 1998. If an action for spousal support was commenced prior to January 1, 1998, the Act does not apply to it. If a divorce action was commenced prior to January 1, 1998 and an incidental action for spousal support was commenced on or after January 1, 1998, the Act does not apply to the spousal support action. If a suit containing both a divorce action and an incidental action for spousal support is filed on January 1, 1998 or thereafter, the Act applies to it.

The Act also does not apply to a reconventional demand to an action for separation from bed and board, for divorce, for spousal support, or for other incidental relief when the principal action<sup>263</sup> was filed before January 1, 1998, although the reconventional demand was filed on January 1, 1998 or thereafter. The law in effect prior to January 1, 1998 governs these spousal support actions.

C. *Revised Statutes 9:387*

*§ 387. Spousal support; period of grace after effective date of spousal support revision act*

*A person who is entitled to assert a claim for spousal support, and who is adversely affected by the provisions of Acts 1997, No. 1078, has one year from January 1, 1998, within which to assert a claim under the law in effect prior to that date.*

---

259. La. Code Civ. P. art. 421.

260. *Id.*

261. See Rigby and Spaht, *supra* note 11.

262. La. Civ. Code art. 105. Civil Code article 105 provides: "In a proceeding for divorce or thereafter, either spouse may request a determination of custody, visitation, or support of a minor child; support for a spouse; injunctive relief; use and occupancy of the family home or use of community movables or immovables; or use of personal property." Comments (a) and (b), Revision Comments - 1990 to Civil Code article 105 refer to the matters enumerated in the article as "incidental issues." The incidental matters or issues authorized by Civil Code article 105 are to be distinguished from the incidental demands or actions regulated by Louisiana Code of Civil Procedure articles 1031-1116. These are reconvention, cross-claims, intervention, and third party demands. Unless one of these types of incidental actions or demands is used to assert one of the incidental matters permitted in Civil Code article 105, the procedural rules of incidental actions or demands are inapplicable to an action instituted under Civil Code article 105. All of these incidental matters may be instituted by summary proceedings. La. Code Civ. P. art. 2592(8).

263. See *Moore v. Gencorp, Inc.*, 633 So. 2d 1268 (La. 1994), for differing opinions concerning the definitions of "principal action" and "main demand."



This section provides a grace period of one year from January 1, 1998 for a person who is entitled to assert a claim for spousal support and who is adversely affected by the provisions of the Act to assert a claim under the law in effect prior to January 1, 1998.<sup>264</sup>

*D. Revised Statutes 9:322, 323 and 324*

*§ 322. Judgment or order for support not to be recorded*

*It is unlawful for any recorder of mortgages in the state of Louisiana to record a judgment or order for spousal or child support by any court, and if such a judgment or order is recorded, it shall not have the effect of a judicial mortgage and shall be forthwith canceled by the clerk upon demand, in writing, by the party against whom it is rendered, without charge, except as provided in R.S. 13:4291.*

*§ 323. Recordation of judgment or order for amount due*

*A recorder of mortgages shall record, at the request of any person in interest, a judgment or order for spousal or child support for the amount that the court has decreed to be due and executory, which judgment or order shall be a judicial mortgage in the amount only found to be due, together with costs and interest.*

*§ 324. Cancellation of record following payment*

*A recorder of mortgages shall forthwith cancel and erase from his records any judgment or order recorded in his office as provided in R.S. 9:323 upon the order of the person in whose favor said judgment or order was rendered or upon proper evidence showing payment in full by the person against whom said judgment or order was rendered.*

These sections are amended, renumbered, and reenacted to conform them with the use of the term "spousal support" in the Act, instead of the term "alimony," and to include "child support" in their provisions.

*E. Revised Statutes 9:382*

*§ 382. Present effect of judgment of separation from bed and board*

*A judgment of separation from bed and board or divorce rendered before January 1, 1998, or a judgment rendered in an action governed*

---

264. La. R.S. 9:387 (Supp. 1998). This provision is designed to protect a person from being unconstitutionally divested retroactively of a vested substantive right. Shorter grace periods have been upheld. See *D'Spain v. D'Spain*, 527 So. 2d 309 (La. App. 5th Cir. 1988), and the cases cited therein. See also *W. Lee Hargrave, Louisiana Constitutional Law*, 43 La. L. Rev. 505, 509-10 (1982). But see *State of Louisiana, through the Dept. of Highways v. Tucker*, 247 La. 188, 170 So. 2d 371 (La. 1964).

by R.S. 9:381, shall have the same effect that it had prior to January 1, 1998. These effects include, but are not limited to:

(1) Spouses who are judicially separated shall retain that status until either reconciliation or divorce.

(2) A judicial determination of fault or freedom from fault made prior to January 1, 1998 shall have the same effect on the right to claim spousal support as it had prior to January 1, 1998.

(3) A judgment of separation or divorce rendered prior to January 1, 1998, without a determination of fault shall not preclude a subsequent adjudication of fault as a bar to spousal support.

This section previously provided that a judgment of separation from bed and board or divorce rendered before January 1, 1991, or a judgment rendered in an action governed by La. R.S. 9:381 has the same effect that it had prior to January 1, 1991 and listed some effects of those judgments.<sup>265</sup> The section has been amended to change the date to January 1, 1998,<sup>266</sup> the effective date of Louisiana Acts 1997, No. 1078.

## VI. CONCLUSION

It is hoped that, as the bench and bar become familiar with the new spousal support legislation, and as they understand the similarities to, but differences from, the previous law regulating spousal support, the legislation will give courts and litigants better tools with which to fairly resolve the troublesome issues of spousal support. It will not eliminate the spousal conflict, but will give the court better tools and more flexibility in adjudicating that conflict.

---

265. Former Louisiana Revised Statutes 9:382, as added by 1990 La. Acts No. 1009, § 7, effective Jan. 1, 1991, which generally revised Louisiana divorce law, provided:

§ 382. Present effect of judgment of separation from bed and board

A judgment of separation from bed and board or divorce rendered before January 1, 1991, or a judgment rendered in an action governed by R.S. 9:381, shall have the same effect that it had prior to January 1, 1991. These effects include, but are not limited to:

(1) Spouses who are judicially separated shall retain that status until either reconciliation or divorce.

(2) A judicial determination of fault or freedom from fault made prior to January 1, 1991, shall have the same effect on the right to claim spousal support as it had prior to January 1, 1991.

(3) A judgment of separation or divorce rendered prior to January 1, 1991, without a determination of fault shall not preclude a subsequent adjudication of fault as a bar to spousal support.

266. Louisiana Revised Statutes 9:382, as amended by 1997 La. Acts No. 1078, § 3, effective Jan. 1, 1998.

